

RESIDENTIAL TENANCIES AND THE URBAN LAND LAW:

THE GHANAIAN EXPERIENCE

THESIS PRESENTED BY

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ABSTRACT

This thesis examines the functioning (or rather, in most cases, the non-functioning) of residential tenancy law in urban Ghana.

Arising out of a deeply-held conviction that analysis and investigation of law should be rooted in its societal context, the first chapter examines the process of urbanization in Ghana and the housing situation in the urban areas. The interesting juristic issue of the applicability of customary law to residential tenancies is also examined.

The second chapter examines the nature of the residential tenancy in modern urban conditions. This is then compared and contrasted with other seemingly similar institutional arrangements.

The substantive and procedural law affecting the creation of the residential tenancy relationship and the informality which characterizes the creation of the relationship is examined in chapter three.

Examination of the rights and obligations of landlords and tenants starts from chapter four. The maintenance and repairing obligations of the parties are considered in chapter five.

The obligation to pay rent is considered in chapter six - its historical antecedents and the resulting consequences being analysed.

Chapters seven and eight deal with the important legal (but also political and socio-economic) issues raised by rent control and security of tenure.

The thesis ends where it started from with a consideration of the concrete socio-economic and political realities of Ghanaian society and the resulting divergence between law and practice.

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PREFACE

This study is first and foremost an essay in applied jurisprudence; about the interplay of the forces of law and the concrete economic and socio-political dynamics of Ghanaian society. It deals with one of the legal arrangements for the provision of housing for many members of the urban population. The study springs from a deeply-held conviction that the study, analysis and investigation of legal phenomenon must be rooted in its societal context. It is imperative that doctrine is not abstracted from its socio-economic and political context.

Arising out of this major perspective, this study emphasises the usefulness (indeed, the imperative) of an inter-disciplinary approach to the study of legal phenomena. Residential tenancy law is the "legalised version" of a human and social arrangement. It has and is affected by demographic, social, economic, political, technological and administrative factors. A study of the functioning of the institution cannot therefore be usefully done by abstracting the legalised part from the societal whole. This study therefore draws heavily on demographic material, like the population censuses of 1948, 1960 and 1970. It also relies on more particularly demographic and sociological surveys and on sociological, economic, political and housing literature.

Law operates in context; it does not exist in a vacuum. The third objective of this study is to demonstrate that the English common law of landlord and tenant (the common law makes no conceptual distinction between urban residential tenancies and rural agricultural tenancies) the foundations of which were laid in a certain historical formation (an agrarian economy, and a political and judicial system in which the land-owning class had a lot of clout) is singularly ill-suited for investigation and analysis of residential tenancies in urban Ghana. Without major surgery, it is ill-equipped to deal with the problems thrown up by the residential tenancy relationship.

It is, however, not only the translocated common law of landlord and tenant which is out of fit with societal conditions in urban Ghana. 'Local' legislation on the rights and obligations of landlord and tenant having being passed without regard to the rules of the science of legislation have been rendered frustrate by the socio-economic and political realities of Ghanaian society. The gap between the rights and protections offered by the law and the use (or non-use) made of them is highlighted.

Lastly, this is an examination, analysis and critique of the balck-letter rules of the law.

In researching this area of the law, a survey¹ was carried out in the three cities of Accra, Kumasi and Sekondi-Takoradi. But for reasons largely of finance (and therefore of personnel) the survey had to be of a limited kind. In all 2,000 tenants and 500 landlords were interviewed. The conclusions that were established cannot, therefore, be said to be scientifically accurate for the whole of urban Ghana. The conclusions, however, confirmed some impressions about this aspect of the law of Ghana not confined to the present writer. This is that large aspects of residential tenancy law have fallen into desuetude. The survey was carried out between July and December 1978. It was designed to establish how far (if, at all) some of the law-in-the-books (like restriction of rental levels, security of tenure, and the repairing obligations of landlord and tenants) operate in practice. It is hoped that in the not too distant future a more comprehensive and scientific survey into this and other aspects of law would be undertaken.

Use has also been made of other primary sources, like legislation, judicial decisions, parliamentary debates, reports of various commissions and committees of enquiry, official publications, government White Papers, etc.

1. Selection of interviewees was not based on any quota sampling.

This has been fortified by consultation of and reference to secondary material, like reports of surveys, books, journals, articles, seminar papers, unpublished theses and dissertations, etc., not only of a strictly legal nature, but crucially, from the other social sciences.

Researching this subject has been made more interesting, more rewarding and infinitely easier by the excellent supervision of Prof. Antony Allott. He has been helpful in his comments, perceptive and critical in his analysis, but always encouraging. I am indebted to him.

The thesis also owes much to Dr. Gordon Woodman and Mr. Tsatsu Tsikata who, as my teachers in jurisprudence and immovable property law when I was an undergraduate at Legon, impressed upon me—in those formative years of my legal education—the rootedness of law in society, and the imperative never to abstract doctrine or theory from its concrete context. In short, they introduced a young mind to the study of law and society—to the need to study law and "legalised problems" as part of societal whole. To them I say: "Thank you for setting me on the right path".

I am also indebted to Mr. Julius Wellens - Mensah and Mr. R.O. Laryea who through their letters and by steadily supplying me with Ghanaian newspapers, news journals, statutes and other publications kept me informed of developments in Ghana.

Nee-Ashie Kotey
London, April 1981

CHAPTER ONE
SETTING THE CONTEXT

"Law operates in context; it does not exist in a vacuum"¹.

This chapter examines some of the contextual factors which have a bearing on the functioning of residential tenancy law. These provide the flesh which clothe the skeleton of legal doctrine. The course of the process of urbanization is plotted and urbanity is identified. The housing situation in Ghana is examined; the housing shortage and consequent overcrowding in the urban areas, and the nature of the rented accommodation market being demonstrated. These factors have important consequences on the functioning of the legal rules affecting the residential tenancy relationship - these are highlighted at various points of the essay.

It should not be supposed that these are the only contextual factors which condition the functioning of residential tenancy law, that the context is exhausted by an examination of urbanization and the housing question. Other social, economic, political, and administrative factors are equally important². Thus the current general socio-economic situation characterized by hyper-inflation, failure of price control, frequent shortages of essential items, including building materials, institutionalized and endemic corruption and breakdown in the status order, is a crucial factor in the functioning of residential tenancy law. Equally important are political factors like minimal participation by most people in the political process and resultant alienation from, delegitimising of and non-identification with the polity. These are all very much part of the context within which residential tenancy law operates in Ghana.

For reasons, largely of style and presentation, these other contextual considerations are analysed in the final chapter.

1. Allott, A.N., The Limits of Law, London, 1980, p.99.

2. See *infra*, Chapter 9.

A URBANIZATION

I What is an urban area?

In its post-independence population censuses (1960 and 1970), Ghana has adopted the U.N. proposal and defined an urban area as one with more than 5,000 people. In both these censuses, therefore, the sole determinant of urbanity has been the size of population. This is also in accord with the view of Hauser that urbanism is a function of size, and that size and density must be sole determinants of urbanity¹.

The view that size is the sole determinant of urbanity has, however, not gone unchallenged. In his article "Theory and research in urban growth", Sjoberg argues that it is practically difficult if not impossible to adopt size as the sole criterion for determining urbanity². Commenting on size and density as the sole determinants of urbanity, Sjoberg writes:

"... these are insufficient. We add the requirements of a significant number of full-time specialists including a literate group engaged in a relatively wide range of non-agricultural activities"³.

Due to the functional complexity of urbanity, it is not scientific to use population as the only index of urbanity⁴.

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1. Hauser, P.M., The Study of Urbanization, New York, 1967.
 2. Sjoberg, G., "Theory and Research in Urban Growth", in Hauser, P.M., The Study of Urbanization, New York, 1967.
 3. Sjoberg, G., The Pre-industrial City: Past and Present, Glencoe Illinois, 1960.
 4. See Ewusi, K., "The towns of Ghana and their levels of development", (1977), Vol.6, No.1, Universities, p.156.

The population of a locality should provide the base from which a definition of urbanity must start; but it should not end there. *We noted* that Ghana has adopted the U.N. norm that all localities with ^a population of over 5,000 should be considered urban. Applying this norm the 1970 population census showed that there were 47,634 rural areas and 135 urban centres. (See Table 1, for urban areas and their population and other important demographic facts as shown by 1970 population census).

TABLE 1

TOWN	Population in 1970	Population in 1960	Growth Rate (% per Annum)	% Employed in Agric.
Accra	564,194	337,828	5.3	2.3
Kumasi	260,286	180,642	3.8	6.0
Tamale	83,653	40,443	7.5	19.0
Tema	60,767	14,937	15.1	5.2
Takoradi	58,161	40,937	3.6	3.3
Cape Coast	51,653	41,230	2.3	8.5
Koforidua	46,235	34,856	2.9	7.9
Teshie	39,382	19,823	7.1	10.5
Sekondi	33,713	24,513		3.3
Old Tafo	33,661	10,909	11.9	7.0
Obuasi	31,005	22,818	3.1	7.8
Winneba	30,778	25,376	2.0	23.7
Nsawam	25,518	20,240	2.3	16.0
Ho	24,199	14,519	5.2	9.7
Sunyani	23,780	12,160	7.0	21.2
Nkawkaw	23,219	15,627	4.0	16.4
Ashiaman	22,549	2,624	23.5	5.2
Yendi	22,072	16,096	3.2	38.9
Agona Swedru	21,522	18,293	1.6	14.9
Wa	21,374	14,342	4.1	22.8

Cont. ..

TOWN	Population in 1970	Population in 1960	Growth Rate (% per Annum)	% Employed in Agric.
Oda	20,957	19,666	0.6	14.8
Bawku	20,567	12,719	9.3	13.3
Effiakuma	20,182	10,167	7.1	4.0
Balgatanga	18,896	2,575	13.1	22.6
Asamankese	16,905	16,718	0.1	26.6
Dunkwa	15,437	12,689	2.0	13.1
Prestea	15,143	13,246	1.4	6.3
Hohoe	14,775	9,502	4.5	21.2
Agogo	14,717	10,356	3.6	66.7
Tarkwa	14,702	13,545	0.8	5.3
Keta	14,446	16,719		16.6
Berekum	14,296	111,148	2.5	33.1
Anloga	14,032	111,038	2.4	33.9
Mampong (Ash.)	13,895	7,943	5.7	31.6
Nungua	13,839	7,068	6.9	8.0
Wenchi	13,836	10,672	2.6	33.1
Tema-Newtown	13,176	7,662	5.6	21.6
Kpandu	12,842	8,070	4.8	20.4
Suhum	12,421	10,193	2.0	12.3
Akwatia	12,177	12,592		16.5
Techiman	12,068	8,775	3.2	45.4
Saltpond	11,849	9,869	1.9	15.9
Aflao	11,397	7,439	4.4	13.1
Elmina	11,401	8,534	2.9	23.0
Bekwai	11,287	9,093	2.2	14.9
Nyakrom	11,252	13,467		58.9
New Tafo	11,114	10,557	0.5	11.2
Begoro	11,043	9,289	1.7	62.6
Konongo	10,881	10,771	0.1	24.9
Ejura	10,664	7,078	4.2	47.2
Dzodze	10,390	5,776	6.0	23.8
Moree	10,086	7,634	2.8	39.0
S.Bereku	9,921	7,984	2.2	35.0
Savelugu	9,895	5,949	5.2	63.9

Cont. ..

Town	Population in 1970	35	Growth Rate (% per Annum)	% Employed in Agric.
		Population in 1960		
K.Mintsim	9,747	6,333	4.4	13.4
Bibiani	9,691	12,942		29.2
Mim	9,630	6,805	3.5	56.7
Somanya	9,326	9,258		15.2
Dorma Ahenkro	8,959	7,107	2.4	39.2
Apam	8,903	8,728	0.2	4.3
Tegbi	6,628	5,924	1.1	35.6
Mumford	8,566	8,666		40.3
Nsuatre	8,467	6,262	3.1	77.6
Akyease	8,466	9,760		65.8
Axim	8,107	5,619	3.7	33.1
Bimbilla	8,068	4,214	6.7	50.6
Peki	8,054	5,154	4.6	55.6
Bechem	7,770	5,501	3.5	39.4
Damongo	7,760	6,575	1.7	52.5
Shama	7,739	6,718	1.4	38.8
Akosombo	7,716	178	45.5	5.5
Aburi	7,616	4,715	5.0	31.2
Madina	7,715	-	-	3.9
Besease	7,451	7,542		61.5
Akropong	7,426	55,606	2.9	31.7
Achirua	7,355	5,672	2.6	41.6
Akmadan	7,310	4,847	4.2	70.5
Foso	7,249	5,284	3.2	42.0
Techimentia	7,207	5,583	2.6	74.5
Kadjebi	7,194	7,491		15.0
Nkoranza	7,191	6,250	1.4	60.3
Samreboi	7,151	4,514	4.7	18.1
Kintampo	7,149	4,678	4.3	39.7
Effiduase	6,967	6,213	1.2	40.6
Esikuma	6,948	5,356	2.6	49.9
Larteh	6,725	6,381	0.5	48.8
Tepa	6,696	5,409	2.1	36.3
Kumawu	6,670	4,962	3.0	65.4
Kwanyarko	6,648	4,216		56.5
Atebubu	6,630	4,216	4.6	40.9
Kade	6,627	6,274	0.6	31.3
D.Nkwanta	6,585	5,576	1.7	60.4

Cont. ..

Town	Population in 1970	36	Growth Rate (% per Annum)	% Employed in Agric.
		Population in 1960		
Asankrangua	6,571	5,497	1.8	57.2
Salaga	6,413	4,199	4.3	42.1
Jasikan	6,403	4,989	2.5	24.8
Krobo Odumase	6,343	4,519	3.5	28.1
Akwatia	6,285	4,826	2.7	49.3
Effiduase	6,207	3,604	5.6	29.0
Wiamoase	6,185	4,843	2.5	71.4
Bawjiase	6,183	5,723	0.8	58.1
Gyenegyene	6,164	4,288	3.7	82.2
Asesewa	6,111	4,282	3.6	15.8
Kukurantumi	6,067	5,061	1.8	45.5
Agona Swedru	6,037	6,881		45.5
Wamfie	6,025	4,963	2.0	71.7
Abetifi	6,024	4,973	2.0	42.1
Komenda	5,966	4,261	3.5	24.0
Anomabu	5,931	5,423	0.9	32.3
Mpraeso	5,908	5,193	1.3	24.8
Mampong	5,818	4,449	2.7	33.5
Akoroso	5,741	5,398	0.6	44.1
Sefwi Wiawso	5,558	4,430	2.3	37.1
Brakwa	5,499	2,198	9.6	77.2
Yeji	5,485	2,198	9.6	29.6
Yamfo	5,474	4,264	2.5	73.2
Awaaso	5,449	3,548	4.4	37.5
Half-Assini	5,428	4,575	1.7	35.7
Afiedenyigba	5,424	4,920	1.0	26.4
Kibi	5,408	5,009	0.7	24.0
Obo	5,328	3,983	2.9	53.0
Walewale	5,302	4,493	1.7	38.6
Bepon	5,265	4,178	2.4	79.8
Odumasi	5,209	5,540		47.8
Abodom	5,195	5,085	0.2	74.6
Old Ningo	5,116	2,332	8.3	37.6
Kunbugu	5,153	4,481	1.4	63.2
Dzelukope	5,153	5,111		14.0
Odoben	5,101	4,723	0.8	62.2
Bobikuma	5,097	4,726	0.7	73.7

Cont. . .

Town	Population in 1970	Population in 1960	Growth Rate (% per Annum)	% Employed in Agric.
Kete-Krachi	5,097	3,928	2.6	20.9
Sekodumasi	5,075	4,710	0.7	78.8
Kpedze	5,062	4,576	1.0	33.3
Juabeng	5,018	3,426	3.9	61.8
Nkenkaso	5,007	4,487	3.7	69.6
Goaso	5,001	3,454	3.8	30.6

The application of the U.N. norm does not, however, really distinguish the urban from the rural. From the 1970 census figures this table may be drawn.

TABLE 2

Classification	Size	No. of Localities
Cities	100,000 and more	2
Large towns	20,000 - 100,000	21
Medium-Size towns	10,000 - 20,000	29
Small towns	5,000 - 10,000	83

As can be seen from the table a majority of these localities fall into the category Ewusi labels "Small Towns". These localities, as Addo points out¹ and as will be demonstrated presently, show characteristics closer to rural agricultural localities than urban centres. As Ewusi points out, most of them are really overgrown villages². It is therefore suggested that the base-limit for urbanity should be a population of 10,000.

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1. Addo, N.O., Dynamics of Urban Growth in South-East Ghana, Unpublished Ph.D. thesis, Univ. London, 1969, p.28.
 2. Ewusi, K., The towns of Ghana and their levels of development, (1977), Vol.6, No.1, Universitas, p.156.

II Structure of employment as a determinant of urbanity

Occupation is an important determinant of urbanity. Hence the definition of urban/rural was adopted during the planning of the Census on the assumption that localities with a population of 5,000 and over are mainly non-agricultural.

The 1970 population Census provides useful information on the employment structure of localities. Table 3, gives the distribution of towns according to their employment structure.

TABLE 3

Towns with proportion of employment in agriculture (%)	Number of Towns
0 - 10	19
10 - 20	21
20 - 30	20
30 - 40	27
40 - 50	15
50 and above	33

It was suggested by some commentators during the 1970 Census that localities with more than 50% of their working population employed in agriculture should be considered rural. On this basis 33 localities designated by the census as urban should be considered as rural towns¹.

The 1970 population census showed that the largest centres had the smallest percentage employed in agriculture. Accra had only 2.3% of its workers employed in agriculture, Takoradi 3.3%, Tema 5.2% and Kumasi 6.0%². It thus showed that there is some correlation between size of town and employment in agriculture³. The largest rural towns (each of which had a population of more than 10,000) were Agogo, Nyakrom and Begoro; but all these towns are famous for cocoa farming

1. See Table 1: Source 1970 Population Census.

2. Source: 1970 Population Census. See Table 4.

3. See Table 1, supra.

An urban area may thus be defined as a town with a population of at least 10,000 and with less than half of its working population involved in agriculture. These are the towns with which this study is concerned. It must be pointed out, ex Abundanti cautela, that this definition is formulated firstly for modern Ghana and secondly for the purposes of this study. Like all definitions it makes no claim to 'rightness'. It, therefore, does not seek to exclude from the definition of urbanity towns and cities of earlier civilizations. The definition is supposed to be entirely functional. Of necessity, different epochs (and analysis of them) will require different definitions.

The compendious term "Urban Ghana" will, therefore, be used in the following pages to mean (unless otherwise indicated) the areas which satisfy the above definition. These are:

TABLE 4

TOWN	Population in 1970	Working Population involved in Agric. (%)
1. Accra	564,194	2.3%
2. Kumasi	260,286	6.0%
3. Tamale	83,653	19.0%
4. Tema	60,777	5.2%
5. Takoradi	58,161	3.3%
6. Cape Coast	51,653	8.5%
7. Koforidua	46,235	7.9%
8. Teshie	39,382	10.5%
9. Sekondi	33,713	3.3%
10. Old Tafo	33,661	7.0%
11. Obuasi	31,005	7.8%
12. Winneba	30,778	23.7%
13. Nsawam	25,518	16.0%
14. Ho	24,119	9.7%
15. Sunyani	23,780	21.2%
16. Nkawkaw	23,219	16.4%
17. Ashiaman	22,549	5.2%

Cont. ..

Town	Population in 1970	Working Population involved in Agric. (%)
18. Yendi	22,072	38.9%
19. Agona Swedru	21,522	14.9%
20. Wa	21,374	22.8%
21. Oda	20,957	14.8%
22. Bawku	20,567	13.3%
23. Effiakuma	20,182	4.0%
24. Bolgatanga	18,896	22.6%
25. Asamankese	16,905	26.6%
26. Dunkwa	15,437	13.1%
27. Prestea	15,143	6.3%
28. Hohoe	14,775	21.2%
29. Tarkwa	14,702	5.3%
30. Keta	14,446	16.6%
31. Berekum	14,296	33.1%
32. Anloga	14,032	33.9%
33. Mampong (Ash.)	13,895	31.6%
34. Nungua	13,839	8.0%
35. Wenchi	13,836	33.1%
36. Tema Newtown	13,176	21.6%
37. Kpandu	12,842	20.4%
38. Suhum	12,421	12.3%
39. Akwatia	12,177	16.5%
40. Techiman	12,068	45.4%
41. Saltpond	11,849	15.9%
42. Aflao	11,397	13.1%
43. Elmina	11,401	23.0%
44. Bekwai	11,287	14.9%
45. New Tafo	11,114	11.2%
46. Konongo	10,881	24.9%
47. Ejura	10,664	47.2%
48. Dzódze	10,390	23.8%
49. Moree	10,086	39.0%

III. The process of urbanization

Plotting the course of urbanization in modern Ghana is hazardous. It depends very largely on one's definition of urbanity. It also depends on how far back one is prepared to go. But perhaps crucially, it depends on whether one considers the socio-economic developments engendered by colonialism as being of a particular genus, or whether they are just a variant of socio-economic developments which had been taking place in West Africa since the days of the ancient Ghana, Mali and Songhai empires and the kingdoms of the Yoruba, of Dahomey, of Asante and of Benin, and of the spread of Islam and the activities in the northern half of what is now modern Ghana.

Belonging to the latter school is Louis Wirth, who has written:

"It is particularly important to call attention to the danger of confusing urbanism with industrialism and modern capitalism . . . Different as the cities of earlier epochs may have been by virtue of their development in a pre-industrial and a pre-capitalistic order from the great cities of today, they were nevertheless cities"¹.

Agreeing with this view, Gugler and Flanagan have traced the process of urbanization in West Africa to the earlier civilization of ancient Ghana, Mali and Songhai and the relatively later civilization of Boruu - Karnem, the Hausa states, the kingdoms of the Yoruba, Asante, Gonja, etc., and the trade and enterprise generated within the region (intra-regional trade²). The socio-economic forces unleashed by colonialism are thus a variant (the early colonialists were attracted by gold, ivory, etc., which were some of the main items in the trans-saharan trade) of socio-economic and political factors already at work in the sub-region. The process of urbanization is, therefore, seen as a continuum, with changes on the way — new cities being born, some old ones being transformed, others not surviving — in response to changed and changing socio-economic dynamics within the society and in her relations with the outside world.

1. "Urbanism as a way of life", (1938) 44 American Journal of Sociology 1, 7-8.

2. Gugler, J & Flanagan, W.G., Urbanization and Social Change in West Africa, Cambridge, 1978, pp.1-26.

In the particularly Ghanaian context, Kwamena Dickson has traced the origins of urbanism in Ghana to pre-colonial times and noted the specialization which led to the development of "embryonic towns"¹. Dickson notes that changes in social organisation, the establishment of dominance by one political group over others and the establishment of larger chiefdoms and the convergence of trading caravans and long-distance traders led to the development of embryonic towns which were urban in their characteristics. He cites as example of such towns Wa, Yendi, Kintampo and Kumasi.

While not wishing to deny the status of urbanity to pre-colonial towns like Kumasi-Saleh, Timbuktoo, Kano and Ibadan in other parts of Africa and Wa, Yendi, Kintampo and Kumasi in Ghana, it is suggested that urbanism — as we know it today — is predominantly a post-colonial development². It is a result of socio-economic forces unleashed by colonialism. In considering the process of urbanization, therefore, the pre-colonial antecedents of all the Ghanaian urban centres (with the possible exception of Kumasi) need not be examined.

IV. Urban Growth

The population of Ghana has increased rapidly in the last three decades. The 1948 population of 4,118,000 rose to 6,726,815 in 1960 and to 8,559,313 in 1970. It would now be over 10 million.

Even more phenomenal is the increase in the number of people living in the urban areas. The number of people living in urban Ghana³ rose from 538,000 in 1948 to 1,551,000 in 1960 and to 2,472,456 in 1970. Thus by the definition employed in the 1970 Census, 28.9% of all Ghanaians lived in urban areas. Exception has been taken to census definition, but even using our own definition shows that in 1970, 1,766,976 lived in urban centres.

It may be useful to look at the growth of some of the major urban centres.

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1. Dickson, K.B., The Ghanaian Town, its Nature and Function, Accra, 1971, pp.1-5.
 2. See Addo, N.O., "Some Aspects of the relation between immigration and socio-economic development in Ghana, in Addo, et.al (eds.) Population and Socio-Economic Developments in Ghana, No.2, Ghana Population Studies, Univ. Ghana, Legon, 1969, p.101.
 3. Census definition.

TABLE 5

Growth of Major Urban Centres (Since 1948)

TOWN	Pop. in 1948	Pop. in 1960	Pop. in 1970
Accra	134,000	337,828	564,194
Kumasi	71,000	180,642	260,286
Tamale	17,000	40,443	60,767
Tema	-	14,937	60,767
Takoradi	17,000	40,937	58,104
Cape Coast	23,000	41,230	51,653
Koforidua	19,000	34,856	46,235

Thus from 1948-60 the population of the seven largest towns increased by about 400,000 — about 40% of all inter-censal population growth and a growth rate of 38.7%. From 1960-70 the population of these seven towns increased by about 425,000 — about a sixth of inter-censal population growth.

What then are the causes of this exceptionally rapid rate of urbanization?¹

The first reason is the general increase in population, the result of a low-mortality rate which is due, in part, to better health facilities, better education, the abolition of the slave trade and of inter-tribal and internecine wars, etc.

But the most important single cause of urbanization in Ghana has been migration — both immigration from neighbouring countries in search of jobs and opportunities and internal rural-urban migration². In more recent times internal rural-urban migration has been the more important factor³.

Migration is nearly always a response to socio-economic and political impulses.⁴

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1. The reasons are crucial in considering whether the customary law is applicable to residential tenancies in urban Ghana:
See *infra*, pp.22-30.
 2. See Caldwell, J.C., "Migration and urbanization", in Birmingham, W., et.al., A Study of Contemporary Ghana, Vol.2, London, 1967, p.111.
 3. *ibid*.
 4. See Caldwell, J.C., *supra* and Addo, N.O., "Some aspects of the relation between migration and socio-economic development in Ghana, *op.cit*."

In the present context, it is invariably a corollary to industrialization and 'modernization'. Addo notes:

"In traditional, subsistence, and settled agricultural communities the forces that give rise to migration and rapid turnover of population are either absent or they are usually marginal and of little significance. In Ghana, no convincing evidence exists to show that any systematic type of individual migration took place within the country before the nineteenth century"¹.

Migration in Ghana was a response to economic and socio-political impulses unleashed by the establishment of colonial rule in Ghana.

The socio-political environment was significantly altered by the establishment of suzerainty over the whole country by a superior power. The establishment of law and order made the country safer (inter-tribal wars and fratricidal struggles were reduced, the marauding bands of slave conquerors were brought under control and the whole country became one British colonial 'possession'). In short, it was safer to move within different parts of the country.

The establishment of a safer socio-political climate would not have resulted in migration had it not been paralleled by crucial economic developments. These were the introduction of the modern system of mining and the introduction and development of cocoa farming.

The introduction of the modern system of mining into some parts of the country was the first major economic dynamic. This was soon followed by the introduction of cocoa. These two developments provided stimuli for growth and development of the economy.

1. Addo, N.O., "Some aspects of the relation between migration and socio-economic development in Ghana", in Addo, N.O., et.al. (eds) Population and socio-economic development in Ghana, No.5 Ghana Population Studies, Univ.-Ghana, Legon, 1960, p.101.

New opportunities were opened up for people to move into the wage and income - earning economy. Little wonder that mining towns like Obuasi and Tarkwa and cocoa-producing towns like Nkawkaw, Tafo and Sunyani have been in the forefront of urbanization in Ghana.

But, perhaps more importantly, both cocoa and ~~the~~ modern system of mining indirectly led to more rapid urban growth. The establishment of this export-oriented economy necessitated the development of infrastructural facilities to service these industries. Hence the establishment of administrative centres, shipping ports, trade centres, railway transportation and stations, road, schools, etc. The development of urban centres like Accra, Kumasi, Takoradi, Tema, Cape Coast, Sekondi, Tamale and Koforidua is traceable to one or several of such factors.

Though the pattern of urbanization was established in colonial times, it must be pointed out (though it must be self-evident to any student of the political economy of neo-colonialism) that this pattern of urbanization has persisted in independent Ghana.

Urbanization in Ghana (as it manifests itself today) is, therefore, a twentieth century phenomenon. As an example, we note the rapid growth of Accra.

TABLE 6

Pace of Accra's Growth

Year	Population
1931	70,000
1948	134,000
1960	337,828
1970	564,194

V. Why limit discussion to urban Ghana?

The crucial factor is that Ghana is fast becoming urbanized, i.e., more and more of her people are becoming urban rather than rural dwellers¹. This process is continuing and will continue for some time. In a recent SCOPE² study, Shelter Provision in Developing Countries, Ghana was classified as having a low "urban stability", i.e., an unstable urban situation. Urban stability was defined by the report as:

"... the potential capacity of a country to continue to urbanize, given the size of its population, its level of economic development, the pattern of demographic, and the current balance between rural and urban residence"³.

This study thus looks at one of the arrangements for the provision of shelter to an increasingly growing part of Ghanaian society. Between 1921 and 1970 the rural population multiplied about $2\frac{1}{2}$ times while the urban population (census definition) multiplied $8\frac{1}{2}$ times.

1. Supra, pp. 42-45.

2. Scientific Committee on Problems of the Environment, it is a committee of the International Council of Scientific Unions.

3. Mabogunje, A.L., et.al., Shelter Provision in Developing Countries, SCOPE 11, Chichester, 1978, p.17.

Secondly, the housing situation in the urban areas as will be presently demonstrated¹, is different from that prevailing in the rural areas. In fact one of the central themes of this study is that residential tenancies in an urban context activate different issues from tenancies in a rural environment.

B. THE HOUSING SITUATION

House-building in Ghana is mostly undertaken by private individuals, rather than by corporate groups. Most of the houses are built by a mason, bricklayer, carpenter and labourers employed individually by the house-builder or mason acting on his behalf and not by corporate contractors. The United Nations Technical Assistance team (under the chairmanship of Charles Abrams) which studied the housing problem in Ghana reported:

"Most of its building operations are still undertaken through self-help operations. Unlike the more urbanized countries its people have not yet reached the point where home building must be done through a multitude of specialized sub-contractors using specialised materials"².

In more recent times public corporations have been established and charged ^{with} the function of building houses. The main such body is the State Housing Corporation; another is the Tema Development Corporation. The attempt at public housing construction has, however, had minimal effect on the housing situation. The public corporations have failed to achieve their building targets. Up to 1972 the State Housing Corporation (S.H.C.) was building at the rate of 500 units per annum instead of its target of 2,000 per annum³. The only period when the S.H.C., was near reaching its target was between 1972-75 when it launched a "crash programme". This low-level efficiency is partly due to economic conditions in the country with the attendant shortages of building materials, the particular problems of the British-style public corporation in Ghana⁴, and other socio-political

1. *infra*, pp. 49-56.

2. Housing in Ghana, New York: United Nations, 1957.

3. See The Mirror, Feb, 2, 1979, p.6.

4. See Pozen, R.C., "Public corporations in Ghana: a case study in legal importation", (1971) 130 Wisc.L.Rev.243; Botchway, E.A., "Operational autonomy and public accountability: A case study of Ghana's development experience and a blue print for reform", (1973) 3 Ga.J.Intl. & Comp.Law 55.

administrative incompetence and mismanagement¹. The government White Paper to the report of the commission of enquiry into the operation of S.H.C. notes:

"The findings of the Commission which the government accepts generally follow the now familiar pattern of dishonesty, incompetence, favouritism, barefaced stealing, intimidation, arbitrary use of power over centralization of authority, indifference and ineptitude by persons placed in positions of authority and responsibility over the Housing Corporation . . ."².

Allocation of the houses built by these public bodies presents another chapter in the sad and sordid story which has made Ghana what it is today. The government White Paper cited above noted:

"On the question of allocation, the corporation set out to follow the policy of 'first come first served' related to the payment of the minimum deposit laid down by the Corporation; but this policy was abandoned early on and having constituted Allocation Committees in all the regions composed entirely of C.P.P. supporters, houses under the cloak of 'priority list' 'special reasons', 'special instructions' and so on were allocated to party supporters regardless as to when they paid their deposits and how much deposits they paid"³:

The catalogue of corruption, incompetence and mismanagement was also found in the allocation of houses by the T.D.C.⁴. That it is continuing is evidenced by a recent report in West Africa⁵.

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1. See Report of the Commission of Enquiry into the Operation of the State Housing Corporation, Accra, 1968
 2. White Paper on the Report of the Commission appointed to enquire into the manner and operation of State Housing Corporation, W.P/68, para.3.
 3. ibid.
 4. Report of the Committee of Enquiry into Alleged malpractices in the affairs of the Tema Development Corporation, Accra, 1970
 5. No.3300, 20th October 1980, p.2090. Introducing the report of the "One man, one house" Committee the Managing Director of T.D.C. noted that one woman had eight T.D.C. houses. These she let out and charged rents of ₵300-₵400 a month compared to the official rent of ₵20 and ₵30 a month.

"Despite the variety of classifications, the bulk of housing under all the classifications are still represented by self-built housing in which government aid or sponsorship plays a minor part"¹.

I. The housing shortage in the urban areas

Urbanization brings housing problems. This is an almost universal fact². The report of the United Nations Technical Assistance team noted:

"For the very urbanization which is a sign of industrial progress complicates the housing problems by specializing tasks concentrating people, intensifying housing demand, raising land prices, building costs and taxes and enforcing regulations for the more concentrated pattern which further widens the gap between rent and income"³.

The rapid growth in the urban population coupled with inadequate resources for housing provision has led to an acute shortage of housing in the urban areas. This has been attested to by Busia in Sekondi-Takoradi⁴, by the government statistician in Kumasi⁵, and by Acquah in Accra⁶.

In 1954-55 when the United Nations Technical Assistance team visited Ghana, the population of Accra was approximately 162,000, the number of houses about 9,700 and the number of households⁷ 26,260. There were thus 2.71 households per house; and the average number of rooms per household was 1.79⁸. The many people interviewed by the team were agreed on three significant points⁹:

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1. op.cit., p.9, para.21.
 2. See Abrams, C., Man's Struggle for Shelter in an Urbanizing World, Cambridge, Massachusetts, 1964.
 3. op.cit., p.6, para.12 .
 4. Busia, K.A., Report on a Social Survey of Sekondi-Takoradi, London, 1950.
 5. Social Survey of Kumasi, Accra, 1960.
 6. Acquah, T., Accra Survey; A Social Survey of the Capital of Ghana, London, 1958 .
 7. Housing in Ghana, New York: United Nations, 1957, p.9, para.23.
 8. ibid, appendix A, p.50 .
 9. ibid, appendix A, p.44 .

- (I) housing conditions in the urban areas were unsatisfactory;
- (II) there was overcrowding; and,
- (III) the situation was getting worse.

Comparison of the 1948 and 1960 census figures shows that the number of persons per dwelling increased from 10.5 to 18.5 in Accra, from 10.4 to 21.3 in Kumasi, and from 13.6 to 18.3 in Takoradi. The 1960 population census also showed that more than a third of the population lived 20 or more to the same house; and that there was a 25% inter-censal increase in the number of persons per house¹.

The 1966 Annual Report of the Building Research Institute, U.S.T., Kumasi, commenting on the housing situation, noted:

"The country has not solved its housing problem. The acute shortage of houses in the urban areas has become worse in recent years because the construction of houses has not kept pace with the migration to the urban areas.

The 1968 Two-Year Development Plan prepared under the N.L.C. also noted:

"The expansion of industry and commerce in Ghana has drawn a large number of people from the rural areas into the principal cities and towns. This migration has imposed a heavy strain on the available housing. The result has been overcrowding and with it the associated evils of social maladjustment and crime"³.

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1. The 1960 and 1970 Census defined a house as " . . . a structurally separate and independent place of abode. The essential features are separateness and independence. An enclosure may be considered as separate if it is surrounded by walls, fences, etc., so that a person or group of persons can isolate themselves from otherpersons in the community for the purposes of sleeping, preparing and taking their meals or protecting themselves from hazards of climate such as storm and sun".
 2. Kumasi, 1966, p.3.
 3. Two-Year Development Plan, Accra, 1968, p.88.

The 1970 census showed that of the 172,087 houses in urban Ghana (census definition) 88,488 (nearly 50%) housed more than ten people, 34,312 (about 20%) housed more than 20 people. The census also showed that the number of persons per house was 15.7 in Accra, 22.1 in Kumasi, 12.06 in Tamale, 20.3 in Takaradi and 6.06 in Tema. It further showed that the number of households¹ per house in urban Ghana (census definition), was 3.423.

That there is a housing shortage in Ghana was recognised in Nimako v. Archibold². In a case involving the eviction of tenant in Accra, Siriboe J.S.C., took judicial notice of the fact that there is a housing shortage.

The acute housing shortage is a very important contextual fact. It has an enormous impact on the working (or lack of it) of rent restrictions, on the security of tenure of tenants and on the rights and obligations of landlords and tenants. It is one of the factors which determines the bargaining power of landlords and tenants. The effect of this was captured in the opening paragraph of a recent article in The Mirror:

"If the government can relieve workers of the perennial housing shortage, at least, half of the many social problems facing workers will be solved. But as long as this major problem remains with us, workers will continue to be at the mercy of landlords"³.

The figures on the number of persons per house highlights another feature of residential tenancies in urban Ghana. This is that most tenants do not rent a whole house or a complete flat. Tenants usually rent a room or two in a large house (with other tenants renting the other rooms and the landlord sometimes living in the same house). Utilities like kitchen, bathroom and lavatory facilities are shared⁴. Commenting on this phenomenon the report of the United Nations Technical Assistance team noted:

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1. A household is defined by the census as consisting of "a person or group of persons who live together in the same house or compound, share the same house-keeping arrangements and are catered for as one unit".
 2. [1966] G.L.R. 612.
 3. Feb.2, 1979, p.6.
 4. This is relevant in considering the traditional tenancy/licence dichotomy: See infra, pp. 69-72.

The Committee which was chaired by Mr.G.K.A Ofosu-Amaah, a senior lecturer in law at the University of Ghana, found overwhelming evidence of corruption, incompetence, mismanagement and ineptitude¹. On the particular issue of the allocation of houses the committee reported:

" . . . the establishment of Tema Development Corporation has a social and economic objective. It follows, therefore, that in making allocations to the general public, policies should be advanced which have the effect of advancing this objective. Again we could not find any clear rule relating to allocation to members of the general public. We were at various times told that it was the policy of Tema Development Corporation to allocate not more than one unit to an individual tenant. If that was the case we were surprised by the number of cases we found where allocationsof more than one unit have been to the same person"²

Continuing on the policy issues raised by the systemless? mode of allocation the committee reported:

"We were informed that housing units built by Tema Development Corporation were classified as low-income and high-income. Those in the low-income group were subsidised. We would have, therefore, thought that in making allocations especially of low-income units, attention would be paid to the economic status of the applicants. We were disappointed to find out that this was not done and to that extent, the social objective of subsidising rents of low-income group was deliberately and completely defeated"³.

The Ofosu-Amaah Committee reported that employees of T.D.C., were sub-letting at a profit subsidised accommodation let out to them by the corporation⁴.

1. Committee of Enquiry into alleged malpractices in the affairs of Tema Development Corporation, Accra, 1970.

2. ibid., p.34, para.140.

3. ibid., p.37, para.150.

4. ibid., p.36, para.146.

"The mission inspected several privately-built new three or four storied apartment houses at Kumasi where each room was let out to a different family while lavatory, bathing and cooking facilities were used in common"¹.

This contextual feature is important when considering the tenancy/licence mystification which causes problems for English landlord and tenant law and is employed skilfully to frustrate the welfare intention of various Rent Acts.

II. The rented accommodation market

Most landlords are private individuals². The S.H.C., and the T.D.C., build mainly for sale—either by outright purchase or on hire-purchase terms. They both have schemes for the building of some rental units; but as with so much in Ghana today the operation of the scheme is riddled with all the imaginable vices. Commenting on the social injustices in housing, Bannor notes:

"The rental units which were meant to attract cheaper rents were taken over by the few people of power and influence who had no immediate use of them and sublet at fantastic rents to people who were in dire need of them. The same thing happened and is still happening to the S.H.C., houses meant for hire - purchase. Many of these houses have been acquired by the few powerful people in our midsts and rented to needy people at rents which far exceed the monthly payments the owners were making towards the acquisition of the building. In other words the tenants are paying for the building on behalf of the owners"³

The Report of the Committee of Enquiry into alleged irregularities and malpractices in the affairs of the T.D.C., is even more damning.

1. op.cit., p.51.

2. There are no figures on this, but my own impression is that at least 90% of landlords in the rental market are private persons. The public sector is very small, and even where the ultimate landlord is a public body the proximate landlord may be a private person.

3. Bannor, T.M., "Social injustices in housing", The Legon Observer, (1979), Vol.XI, No.10, p.227.

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1. Committee of Enquiry into alleged malpractices in the affairs of Tema Development Corporation, Accra, 1970.

2. *ibid.*, p.34, para.140.

3. *ibid.*, p.37, para.150.

4. *ibid.*, p.36, para.146.

It also reported that houses let to members of the general public were being sub-let at a profit¹. It concluded:

" . . . it is evident that the practice of sub-letting would in many cases defeat the social and economic objectives of Tema Development Corporation"².

It was noted that it is not only rental units from the S.H.C., which were being sub-let. Houses bought outright or on hire-purchase terms, were let out to members of the public at huge profits. The same is true of T.D.C. The Ofosu-Amaah Committee reported:

"It was the corporation's policy that any person could purchase two or more houses under the scheme provided that person has finished all instalments. This meant that any one who could pay the cost of three or four buildings at once was at liberty to procure any number of these houses. Besides, the system of one-third deposit meant that the corporation lent two-thirds of the cost of the house of the prospective buyer. The net result of this policy is that since the demand for houses is greater than the supply in Tema, the purchaser rents his house at rents two or three times higher than the instalment payments under the scheme"³.

By 1973 the practice of people buying subsidized housing from public bodies and then letting them out at huge profits had become sufficiently widespread for statutory notice to be taken of the development⁴. The social injustices of this practice are sufficiently clear from the report of the Ofosu-Amaah Committee. The judgment of a recent article is even more forthright:

"The current system whereby the affluent few acquire large portions of houses built by government agencies with the tax-payers' money and hired at prohibitive prices to the ordinary workers is nothing short of a fraud"⁵.

1. *supra*, p.37, para.151.

2. *ibid*.

3. *ibid.*, p.41, para.165.

4. See Rent Control (Amendment) Decree, 1973 (N.R.C.D.158), s.7.

5. Essien, S.N., "Tenants and landlords", The Mirror, Feb.2, 1979, p.6.

Indeed the case for subsidised public housing which inevitably goes to the relatively rich has not been made. This is so irrespective of the issue of letting or sub-letting at a profit. This point is also taken by Woodman, who writes:

"It appears that in each case the state does not aim to extract the highest possible payments from those who eventually use the buildings. There is indeed some public stress on the object of making them available as cheaply as possible. However, since the supply is limited they cannot be made available to everyone who could use them. It would appear that selection is related in part to the existing wealth of possible applicants. . . . The rent payable for these houses is more that could be afforded by a person with an average income. Thus the general result is to make property available at less than its market price to persons selected in part by the characteristic of having more wealth than most"¹.

The main feature of the rented accommodation market — that it is non-socialised and that the public bodies have failed to bring any significant measure of socialization into the jungle (it is not a system) — is an important contextual fact which has tremendous lessons for attempts at regulating non-socialised markets in developing economies.

C. RESIDENTIAL TENANCIES AND THE CUSTOMARY LAW

Do residential tenancies exist in, or are they known to, the customary law? There is no doubt that tenancies of land² exist in the customary law. The text writers and the judicial decisions attest to this fact.

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1. Woodman, G.R., "Land law and the distribution of wealth", in Ekow-Daniel, W.C., & Woodman, G.R., (eds), Essays in Ghanaian Law, Accra, 1976, p.158 at 173-174.
 2. Despite Ollennu's attempt to include fixtures in his definition of land in the customary law, the preponderance of authority is that land in the customary law is distinct from fixtures upon it: See Ollennu, N.A., Principles of the Customary Land Law of Ghana, London, 1962, pp.1-3; Contra Allott, A.N., Ashanti Law of Property, Stuttgart, 1966, p.143; Kludze, A.K.P., Ewe Law of Property, London, 1973, pp.103-105; Pogucki, R.J.H., Land Tenure in Ghana, Vol.6, Accra 1957, p.8.

Yet all but two of the text writers in their treatment of tenancies make no mention of customary-law residential tenancies, confining themselves entirely to various forms of agricultural tenancies and tenancies of land for building purposes (the so-called building lease)¹.

There is judicial authority which suggests that residential tenancies are unknown to the customary law; viz; Asante v. Gold Coast Drivers' Union². In this case, the plaintiff sought damages for breach of an alleged agreement to let three rooms at a fixed monthly rental. The case originated in a native court. On appeal to the High Court it was held that agreement for a tenancy of a house or of rooms is an institution which finds no place in customary law. The rights and liabilities of the parties could, therefore, only be determined by reference to the common law. The native court, therefore, had no jurisdiction to entertain the suit. The judgment of Adumua-Bossman J., was based in part on the fact that Sarbah, in his Fanti Customary Laws,³ writes about agricultural tenancies and the building lease, but not residential tenancies. Nor, the learned appeal judge noted, is there any mention of residential tenancies in the reports and cases in the appendix to Sarbah's Fanti Customary Laws. The learned judge then cited Sey v. Abadoo⁴ a case involving arrears of rent for occupation of premises, where it was held that English law is applicable. The only plausible basis for the decision in Sey v. Abadoo, argued the learned judge, is that the hire of premises is "a transaction unknown and unrecognised by the customary law". Adumua - Bossman J., concluded:

1. The text writers are Ollennu, N.A., op.cit., Bentsi - Enchill, K., Ghana Land Law, London, 1964; Kludze, A.K.P., op.cit.; Sarbah, J.M., Fanti Customary Laws, London, 1904. The two who accept the existence of customary-law residential tenancies are Allott, A.N., The Akan Law of Property, Unpublished Ph.D. thesis, Univ. London, 1954, p.470 and Pogucki, R.J.H., Land Tenure in Ghana, Vol.IV, Accra, 1955, p.33.

2. (1957) 3 W.A.L.R.5.

3. supra.

4. (1885) F.G.132.

5. supra, at p.9.

"It seems reasonably clear, therefore, from the foregoing survey of the situation, that the agreement for hiring and/or letting of a house or a room has not been one of the transactions known and recognised by native customary law, having well-defined formalities or rites for its creation and with well-recognised incidents and results such as the transactions of outright sale, mortgage or pledge, or tenancy of land. It is one of the many useful forms of transactions introduced to us by our contact with European merchants, and must no doubt have started when merchants required premises for their trading activities in the large towns in the early days"¹.

If one were to rely solely on judicial opinion as expressed through the decided cases, one would conclude that residential tenancies are unknown to the customary law. But this would be to foreclose discussion of very interesting issues thrown up by Asante v. Gold Coast Drivers' Union. It, therefore, becomes necessary to investigate the question (which has jurisprudential implications) of what in the law of Ghana, is meant by "customary law", and what are the sources of its rules.

I. Customary Law

It is now largely accepted in modern jurisprudence that definition is often a question of choice, not of abstract logic². There is no logical connection between a word and phenomena it seeks to describe. There can thus be no 'correct', 'true', or 'proper' as opposed to 'incorrect', 'false', or 'improper' definition of a word. A definition may, however, be 'useful' or 'useless', 'adequate' or 'inadequate' for a particular purpose. A jurist is thus free to fashion his own definition, provided it is made clear in what sense the word is ^{being} used, its usage is consistently followed, and the jurist does not

1. (1957) 3 W.A.L.R.5, 9-10.

2. See Williams, G., "International Law and the controversy^s concerning the word 'law'", in Laslett (ed.), Philosophy, Politics and Society, Vol.1, London, 1956, p.134; Hart, H.L.A., "Definition and Theory in Jurisprudence", (1954) 70 L.Q.R.37; Allott, A.N., The Limits of Law, London, 1980, chap.1, esp.pp.1-4, 34-36; Woodman, G.R., "Some realism about customary law - the West Africa experience", (1969) Wisc. L.R.128; Kantorowicz, H., The Definition of Law, Cambridge, 1958.

arrogate to himself the right to legislate on what the 'proper' meaning of the word is¹.

This view on definition does not entail agreement with Glanville Williams' apparent attitude towards theory and concept². Theory and concept are only relevant as an account of objective social reality. Some theories can therefore be useless because they fail to take account of objective social phenomena. A theory of law is not to be suspended in the air but must be rooted in human historical reality. Juristic science must not be based primarily on ideas and abstractions - law is part of social reality³.

The Interpretation Act, 1960 (C.A.4.) defines customary law thus:

Customary law as comprised in the laws of Ghana consists of rules of law which by custom are applicable to communities in Ghana"⁴.

The definition is not helpful; it begs the question. It does not indicate how to identify a 'rule of law' in contradistinction from, say, a rule of morality or convention. Perhaps more importantly, it gives no indication as to how custom obtains the force of law, for not all custom is law⁵.

Due to the, perhaps inevitable, impreciseness of the definition of customary law in the Interpretation Act, 1960, the courts have been left with the task of fashioning customary-law rules from the practices of the people. In this process there has developed (inevitably?) a cleavage between the practices of the people and the customary law administered by the statutory courts.

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1. The fallacy of the "one proper meaning" approach misled Austin into arguing that customary law and international law were not law "properly so-called".
 2. op.cit., at 148, where he says: "The first misconception is the idea that a controversy as to concepts is not a verbal but a scientific controversy". That such a controversy ought to be scientific is demonstrated by Allott's masterly answer to Hart's and Ross' claim that some societies are so simple they have no law: See The Limits of Law, op.cit., pp.45-72.
 3. See Allott, A.N., The Limits of Law, op.cit., esp. p.45; also Hart who says in the preface to The Concept of Law, that the book is also "an essay in descriptive sociology".
 4. S 18 (1).
 5. For the inadequacies of this definition and the resultant problems for the courts; See Woodman, G.R., "Some realism about customary law - the West African experience", op.cit.

The question being considered does not, however, turn on the judicial/practised customary law dichotomy. It is one of classification; there is no doubt that there is a practice of renting/letting of rooms and houses. Nor is there any disagreement that this practice is a legal arrangement. The controversy is whether it is a customary-law arrangement or a translocated English-law institution.

II. History of residential tenancies

The renting of residential accommodation for a money rent is a relatively recent development. The United Nations Technical Assistance team which visited in 1954-55, reported:

"The rise of the renter class is still at its beginning"¹.

Residential tenancies are an urban phenomenon. The need for a highly developed set of rules to deal with the renting of residential accommodation did not, therefore, exist in pre-colonial times². In traditional society land was plentiful and building a house was not an expensive operation. Every adult member had free access to land and the building was erected from local material with communal help. The societies were settled and there was little migration³. There was thus no need for rented accommodation.

Colonialism and the forces which it unleashed led to migration⁴. People moved in search of jobs in the new mining towns, and in administration, commerce, etc. It also became more and more difficult for people to build their own houses as land became more expensive⁵ and as building costs went higher and higher.

Residential tenancies are, therefore, a relatively recent development; a development no doubt, occasioned by forces unleashed by colonialism - migration and resultant detachment from the traditional community base,

1. Housing in Ghana, op.cit., p.6, para.11 (c).

2. See Pogucki, R.J.H., Gold Coast Land Tenure, Vols.III & IV, Accra, 1955, p.33.

3. *supra*, pp.41-45.

4. *supra*, pp.41-45.

5. For a survey of increases in the price of building land in Accra: See Pogucki, R.J.H., Gold Coast Land Tenure, Vol.III, op.cit., pp.10-12.

urbanization, the rise in the price of land due to its relative scarcity! and the increased cost of building a house (the result of the specialization of tasks and the change from the traditional earth and thatch houses to more modern sandcrete houses in aluminium or asbestos roofing).

III. Do residential tenancies exist in customary law?

The analysis so far has shown that there was no need for people to rent accommodation in traditional society. The law did not, therefore, develop facilitative rules to cater for a non-need (?). Does this then mean that residential tenancies are unknown to the present customary law?

Various forms of permissive occupancy existed in traditional society. Ollennu writes:

"In olden days when money was not of much value and a person's material wealth was measured by the produce of his farm or the size of his herd of cattle, land and house owners permitted strangers to farm portions of their land or to occupy portions of their buildings in return for their working for the owner on his land, in his house, on his farm, or in his creek or pond as the case might be"¹.

Most of these relationships were, however, informal. There was no money rent, and the complex body of rules establishing rights and obligations of landlords and tenants as in, say, English law had not been developed. Adu mua-Bossman J., was, therefore, right when he said that it was not an institution:

" . . . having well-defined formalities or rites for its creation and in the well-recognised incidents and results"².

But this should not necessarily have meant, as he asserts:

" . . . that the agreement for hiring and or letting of a house or rooms has not been one of the transactions known and recognised by native customary law"³.

1. Ollennu, N.A., Principles of the Customary Land Law of Ghana, op.cit., p.79 (emphasis supplied).

2. Asante v. Gold Coast Drivers' Union (1957) 3 W.A.L.R.5, 9-10.

3. *ibid.*

That a new practice had developed and was developing was evidenced by the case before the learned appeal court judge. Appealing to Sarbah and the absence of specialised and differentiated rules dealing with the institution was not very helpful. The learned judge was faced with a juristic choice: to which body of law do we allocate this new development, the developing customary law or the translocated English law? The learned judge plumped for the English law; but it is submitted that such a result was not inevitable¹.

Can the decision in Asante v. Gold Coast Drivers' Union be justified? Some scholars have argued that the payment of a money rent is such a fundamental fact that it changes the nature and character of the arrangement. Onwuamaegbu writes:

"There is no doubt, however, that some forms of tenancy are foreign to customary law. Thus a weekly, or a monthly tenancy at a rent was unknown to, and, therefore, cannot be governed by custom. This means that when a customary tenant is later asked to pay rent monthly, it could be implied that the general law will begin to apply to the relationship between the parties"².

The inexplicable interchange from the present to the past is evidence of the confusion in the author's analysis. It confuses what institutions were known to the customary law and what is the present customary law. It singularly fails to take cognizance of the flexible and dynamic character of customary law. Nor is it clear why the change from seasonal rent in land to a monthly money rent marks such a fundamental change in the character of an institution; there is no logical or intrinsic reason for the sudden change³. It is perhaps for this reason that Allott classifies residential tenancies at a money rent as customary-law institutions, Allott argues:

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1. See Allott, A.N., The Akan Law of Property, Unpublished Ph.D. thesis, Univ. London, 1954, p.470.
 2. Onwuamaegbu, M.O., The Nigerian Law of Landlord and Tenant, London, 1960, p.131.
 3. It may be noted that rent was for a long period of time in English law in forms like military service, labour, etc. In fact the payment of rent is not essential to a tenancy. See Lynes v. Smith (1899) 1 Q.B.486.

"Perhaps the most frequent instance of tenancies for a definite term is to be found in the letting of houses or rooms. The practice of letting rooms is prevalent; rent is payable monthly, and the tenancy is, therefore, by English law a monthly tenancy. These tenancies are usually informal and without written agreement. Although English-type law has intruded, sufficient of customary ideas remain for one to consider such tenancies as customary in nature, and not as the pure off-spring of English law"¹.

A very important point thrown up by this discussion is the time factor in the definition of customary law².

Customary law is based on the practices of a society. It is, therefore, dynamic and flexible, being moulded by changed and changing societal conditions. A developed, specialised and differentiated body of rules may not have existed for the letting of residential accommodation in traditional society (the concrete and objective situational context not requiring such a body of rules). But this should not necessarily have led to the conclusion (when the objective social and economic facts changed and renting of residential accommodation became prevalent) that it was an arrangement being fashioned under the translocated English law.

The people reacted to a changed and changing socio-economic dynamic; it is arguable that in doing this they are involved in practices from which new customary-law rules developed³. Juristically, therefore, it is perfectly proper to classify the institution as a new customary law form.

IV. Is it a live debate?

The juristic decision on whether an institution is a customary-law, common-law,

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1. Allott, A.N., The Akan Law of Property, op.cit., p.470.
 2. See Allott, A.N., New Essays in African Law, London, 1970, p.180, also Allott, A.N., Gluckman, M. and Epstein, Introduction (to), Gluckman, M. (ed), Ideas and Procedures in African Law, London, 1969.
 3. Allott notes that he was informed of the practice of people building houses for the purpose of letting in the urban areas, and comments that this indicates the increasingly commercial attitude developed by modern urban conditions: See The Akan Law of Property, op.cit, p.471. See also Housing in Ghana, New York: United Nations, 1957, p.51.

or statutory institution ought not to be important. It is primarily a classification based on form. It is the content of these bodies of law and their functioning in the concrete Ghanaian context which is important. It was quite possible, if a more questioning and analytical attitude had been adopted by both legislature and judiciary, for the English-law rules (both common-law and statutory) to have been vigorously examined and tested at each turn for their utility and appropriat^eness to the Ghanaian context to be established. The resulting law would have been more firmly based on practice and it would not have mattered how this body of law is classified, as long as it was effective. The sad thing about decisions like Asante v. Gold Coast Drivers' Union is not that it said residential tenancies are an English-law institution; but that having once decided that, the Ghana courts adopted (some would say sheepishly) the English common law lock, stock and barrel, regardless of the context within which it developed and the society it was now to serve (or not serve).

CHAPTER TWO
THE URBAN RESIDENTIAL TENANCY

"A tree that flourishes and is evergreen by the riverside
will not flourish and be evergreen by the desert"¹.

Introduction

The English law of landlord and tenant (the foundation of which was laid in a certain historical formation) was translocated to urban Ghana. This chapter examines how appropriate the "estate-concept" of the tenancy in English law is as an objective account of residential tenancies in urban Ghana. The urban residential tenancy is subsequently distinguished from other similar relationships. It is not intended to provide a detailed account of the English law on these issues². It is only intended to provide enough treatment as a basis for enquiry.

A. Nature of the Institution

The landlord/tenant relationship has been described as:

"that which exists when one person (the lessor or landlord) being possessed of an estate or interest in real property, has granted or is deemed to have granted to another (the lessee or tenant) an estate or interest therein which is less than the freehold and less than the estate of the grantor"³.

At common law the residential tenancy⁴ is seen as creating an estate in land in favour of the tenant. The tenancy relationship though derived from agreement is seen, as resulting in the conveyance of an estate in land. The estate-concept of the residential tenancy derives from the historical development of the tenancy relationship at common law.

Tenancies of land were being used by the twelfth century⁵. This was at

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1. Kaunda, K.K., "Mulungushi speech", Zambia Daily Mail, Lusaka, July 1, 1975.
 2. Interested readers may consult: Woodfall, Law of Landlord and Tenant, London, 1978, Vol.1, pp.1-2; Evans, D., The Law of Landlord and Tenant, London, 1974, pp.12-13 for a fuller account.
 3. Foa, General Law of Landlord and Tenant, London, 1957, p.1.
 4. The common law makes no distinction between residential tenancies and agricultural tenancies of land.
 5. Holdsworth, W.R., History of English Law, London, 1923, Vol.3, p.213; also Denman, D.R., Origins of Ownership, London, 1948, pp.144-5, 152-5.

a time when the feudal system of land tenure was still in operation. The tenancy was, however, not part of the feudal system. Rather, it developed in response to the desire of land owners to use land in a more commercial manner. Lawson, writes thus:

"They (tenancies) were indeed and always have been a commercial intruder into a way of looking at property, which was essentially uncommercial . . ."¹.

One of the most important results of this attitude can be seen in the remedies that tenants originally had against trespassers. Holdsworth states:

"The lessee may, it is true, repel by force; he may, that is reject the would-be ejection if he can, but all the legal remedy he has is a personal action against his lessor on the covenant, by which he may recover damages or, if the term has not expired, possession of the land leased. As against third persons, he has probably no remedy at all. An ejectment by a third person is a wrong to the freeholder, and it is the freeholder alone, who can bring the assize of novel disseisin. The lessees's right is a jus in personam not a jus in rem"².

This situation became extremely inconvenient and it later became necessary to protect the tenant by affording him the right to an action for trespass³. The reasons for this change were partly economic and partly political⁴.

These legal developments resulted in a widespread use of the tenancy as an arrangement for farming. Simpson writes:

"With the decay of the feudal tenurial system and the full recognition of the lease as an adequately protected interest, the lease for years became the legal institution under which a very great proportion of the land of the country was farmed"⁵.

The foundations of the common law tenancy were laid in mediaeval agrarian England. It was then used as an institutional arrangement for the farming of agricultural land.

1. Lawson, F.H., Introduction to the Law of Real Property, London, 1958, p.118.

2. Holdsworth, W.R., op.cit., p.213.

3. Pollock & Maitland, History of English Law, London, 1911, p.106.

4. For a discussion of these developments: See Holdsworth, F.R., op.cit, pp.216-

217; also Milson, S.F.C., Historical Foundations of the Common Law, London 1969.

5. Simpson, A.W.B., Introduction to the History of Land Law, London, 1961, p.233.

It was only later that the tenancy became used in relation to residential property¹. Initially this was mainly in rural communities where it was used for farm hands and agricultural labourers particularly during periods when agricultural labour was badly needed². It is thus clear that the foundations of the common law regulating the landlord/tenant relationship are rooted in agrarian and rural England.

"We are back with the land now and land is really what landlord-tenant law is all about . . . the land is the thing. It is the fields, the orchards, pastures and streams and their possession and use that is important. To comprehend the law it is helpful to envision the tenant leaning on a fence at twilight, watching his fields and awaiting the call to dinner. It is against this simple background that landlord and tenant law took the shape it has essentially retained today"³.

Secondly, the foundations of the common law regulating residential tenancies were developed in a historical formation in which the landowners (the landlords) wielded great political power⁴. They constituted the governing class. They wielded great power in parliament and as justices of the peace, had great power in their neighbourhoods having responsibility for the administration (and, hence the making) of the law.

V. Urban residential tenancies: contract or conveyance?

Having seen that the basis of the common law of landlord and tenant was formulated in rural mediaeval England, it is pertinent to examine how adequate this estate - concept is as an explanation of residential tenancies in urban Ghana. This is because the landlord/tenant law is structured on this premise; from this premise certain consequences flow⁵. Friedman notes:

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1. See Gaulie, E., Cruel Habitations, London, 1974, esp. pp.30-31.
 2. *ibid.*
 3. Quinn, T.M., & Phillips, E., "the law of landlord and tenant: a critical evaluation of the past with guidelines for the future", (1969) 38 Fordham L.R.38.
 4. See Chambers, J.D. & Mingay G.E., The Agricultural Revolution: 1750-1880, Batsford, 1966, p.17; Thompson, F.M.L., English Landed Society in the Nineteenth Century, London, 1962, esp. pp.201 ff; Smith, R.B., Land and Politics in the England of Henry VIII: The West Riding of Yorkshire 1530-40, London, 1970.
 5. These are discussed in the course of the thesis.

"The theory of a lease as a conveyance under which a landlord fully discharged his duty by signing a lease and thereby entitled himself to instalments which were periodically to 'issue' out of land fitted in with the ancient farm lease. The lease was essentially of land; the house was incidental"¹.

The urban residential tenancy is, however, not concerned with the purchase of land. It is concerned with the provision of housing— shelter and amenities like electricity, water, bathroom and lavatory facilities. It deals not with land and interests in land as a factor of production, but with the provision and use of accommodation.

It has been established that:

" . . . the law as to leases is not a matter of logic in vacuo, it is a matter of history that has not forgotten Lord Coke"².

It has also been established that the urban residential tenancy is more of a "package of goods and services"³ than an estate in land. It would thus be:

" . . . revolting to have no better reason for a rule than that it was so laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past"⁴.

It is suggested that the estate - concept of a tenancy is not adequate for analysis of the modern urban residential tenancy and does not identify the central nature of the institution. The modern urban residential tenancy is concerned with the continuous provision of a package of goods and service⁵ housing — in return for periodic payments of rent. It is an arrangement for the continuous exchange of consideration by either party,

1. Friedman, M.R., Friedman On Leases, New York, 1974, p.5.

2. Gardiner v. Butler (1918) 245 U.S.603; 38 Sup.ct., 214, quoted in Friedman, M.R., *ibid.*

3. That the modern urban residential tenancy is a "package of goods and services" was recognised by United States court in Javins v. First National Realty Corp., 428 F.2d. 1071 (D.C.Cir. 1970)

4. Holmes, O.W., "The path of the law", (1897) 10 Harv. L.Rev.457, at 469.

5. A package which includes not merely walls and roof, but also adequate light and ventilation, suitable water and lavatory facilities, secure windows and doors, and electricity.

rather than a once-for-all purchase of an estate in land. The common law draws no conceptual distinction between agricultural tenancies of land (and real property generally) and urban residential tenancies. This is unfortunate; it leads to monstrous consequences¹. The modern urban residential tenancy has little functional similarity with the sale of land or with agricultural tenancies in rural England. The urban residential tenancy is more like an ordinary commercial contract.

B. Distinguishing the residential tenancy from other arrangements.

1. The tenancy and the licence

The common law has traditionally distinguished a tenancy from a licence². In drawing this distinction the common law relied on the concept of "exclusive possession"³. It is not intended to give a detailed treatment of this English-law issue. Suffice it to note that the English courts have now realized that the concept of "exclusive possession" is an unnecessary mystification⁴. The English courts have increasingly taken a functional approach.

a. Shared premises*

At common law:

" . . . the question whether a man is a lodger merely, or whether premises have been let to him so that he is a tenant must depend on the circumstances of each case"⁵.

But traditionally the common law proceeded from the position that if the grantor lived in the house it was not a tenancy. In Toms v. Lockett,⁶

1. These are examined throughout this thesis.

2. See Torbett v. Faulkner (1952) 2 T.L.R.659; Thomas v. Sorell (1673) Vaugh.330.; Keith v. Twentieth Century Club, (1904) 52 W.L.R.544; Hill & Redman, Law of Landlord and Tenant, London, 1976, para.5, p.16.

3. See Megarry, R. & Wade, H.W.R., The Law of Real Property, London, 1975 p.618; Evans, D., op.cit., pp.36-39; Garner, J.F., "A lease or licence", (1963) 107 Solicitors' Journal 246.

4. See R. v. Battersea, etc., Rent Tribunal, ex parte Parikh [1957] 1 All E.R.352.; Luganda v. Service Hotels [1969] 2 All E.R.692.

5. Woodfall, op.cit., p.11.

6. (1847) C.B.5 C.B.23.

*. See Pini-Fortano, J., "The nature of the lease at common law and under the Rent Act, 1968 (Act 225)", (1971) 3 R.G.L. 194.

Lord Maule said :

"Where the owner of a house takes a person to reside in part of it, though such a person has exclusive possession of the rooms appropriated to him, and the uncontrolled right of ingress and egress, yet if the owner retains his control of the house, the individual so occupying a part occupies it as a lodger (or licensee) only and not as a tenant".¹

The onus was on the grantee to prove that he was in fact a tenant.² Some judicial decisions even suggested that the nature of a grantee's interest (tenancy or licence) depended , in part , on the rooms and / or facilities he shared with his grantor.³

Such a view of the law would lead to absurd consequences in Ghana. It has been noted, that a feature of the hiring/letting of residential accommodation in Ghana is that different people take a room or two in a house (sometimes the landlord lives in the house) with utilities being used in common.⁵ To hold that such persons are licensees (or that there is a prima facie case against their being tenants) would not only fail to take cognizance of prevailing practice, but would result in a monstrous state of affairs as a number of low-income tenants are denied what little protection they have.⁶

1. (1847) 5 .CB. 23, 36.

2. Helman v. Horsham & Worthing Assessment Committee [1942] 2K.B.335; Abbeyfield (Harpenden) Society v. Woods [1968] 1W.L.R.374.

3. See Neale v. Del Soto [1945] 1K.B.144; Winters v. Dance [1949] 1L.T.R.165.

4. See Ofori-Boateng, R., "The nature of a lease at common law and under the Rent Act, 1963 (Act 220)", (1971) 3R.G.L.194.

5. Supra, pp.50-53.

6. For example, the implied covenants of landlords stipulated by section 23 of the Conveyancing Decree, 1973.

It is in recognition of these contextual facts that the Rent Act, 1963 (Act 220) defines a lease to include:

" . . . every agreement for the letting of any premises whether oral or otherwise, and whether the terms thereof grant the right of exclusive occupation to the tenant or include the use of any premises in common with the landlord or any other person"¹.

This functional approach to the definition of tenancies is in accord with more recent English-law decisions on "exclusive occupation". In Luganda v. Service Hotels², Lord Denning M.R. said:

"a lodger who takes a furnished room in a house is in exclusive occupation of it; notwithstanding that the landlady has a right of access at all times . . . A person has a right to "exclusive occupation of a room when he is entitled to occupy it himself and no one else is entitled to occupy it"³.

It is suggested that this mystic of exclusive possession should be abolished altogether. In all cases where a person occupies someone's else's property for residential purposes, therebeing no special factors like friendship, affection, family ties, etc., the relationship should be considered as a tenancy relationship.

b. Service tenancy or service occupancy?

The issue of service tenancy or service occupancy arises, at common law, whether an employee occupies accommodation provided by his employer, i.e., when a "service situation"⁴ existed. It is a subbranch of the tenancy/licence mystique; and is supposed to turn on whether or not "occupation is necessary for the performance of services"⁵. A cursory acquaintance with the application of this test demonstrates how illusory the whole exercise is⁶.

1. S.36 2. [1969] 2 All E.R.692. 3. *ibid.*, at p.695.

4. This phrase is borrowed from Arden, A.,; "Service tenancies and service occupancies", (1974) L.A.G. Bulletin 108.

5. Smith v. Seghill (1875) L.R.10 Q.B.D.422, per Mellor J.at428.

6. See Hughes v. Chatham Overseas (1843) 5 M., & G.54; Dobson v. Jones (1843) 5 M & G.54; Thompsons (Funeral Furnishers) Ltd. v. Phillips [1945] 2 All.E.R.49; Fachini v. Bryson [1952] 1 T.L.R.1368.

It is suggested that in all cases where accommodation is granted as a result of a service situation, the employee should have the rights of a tenant while his employment continues. Once his employment ceases, he should be given reasonable notice (to be determined on the basis of the rules for the termination of tenancies) to vacate the premises. Section 17(1) (j) of the Rent Act, 1962 (Act 220) gives the landlord the right to recover possession in such circumstances¹.

c. Customary-law permissive occupancies

Various forms of permissive occupancy exist under customary law. Servants reside in the house of their masters, farmhands and labourers in the houses of their employers, brothers, sisters, nephews, nieces, etc., in the houses of relations.

Identifying the legal nature of these arrangements is fraught with difficulty. It is suggested that when a servant or slave lives in his master's house to perform the household chores then a gratuitous permissive occupancy is created. This is also the result when, out of affection or family ties, a person is allowed to live in the house of another². But it is submitted that where there is a commercial nature to an arrangement (like a paid servant or a farmhand or labourer) and the employee lives in premises separate from that occupied by his employer, a tenancy relationship (on the lines indicated above) exists.

It would be preposterous to assume that the above analysis provides a solution to all the problems thrown up by these socio-economic arrangements. The difficulty encountered in analysing these arrangements is typified by Borketey v. Larkai³. In this case, the defendant had been allowed, as of grace, to stay in a woman's house as her servant. She remained in possession-with the acquiescence of the woman's successors - on the death of the woman.

1. See *infra*, pp. 330.

2. Allott argues, albeit with some reservation, that where a relation is allowed to live in the sole-acquired house of another a tenancy is created: *vide*, The Akan Law of Property, *op.cit.*, p. 453. This is inaccurate, what is granted is a gratuitous permissive occupancy: See Nuamah v. Frimpong [1973] 2 G.L.R. 37.

3. Land Court, Accra, 28th Feb., 1953.

In a later action by the deceased woman's successors to evict the defendant, it was held that the original service occupancy (revocable at will) had ripened into an irrevocable gratuitous tenancy, irrevocable during the lifetime of the defendant. It is submitted that what happened here was that having represented to the defendant (by their acquiescence) that she could live in the house as long as she wanted it was considered unconscionable — at customary law — to evict the defendant.

Another type of customary-law permissive occupancy is that of customary-law office holders. Some holders of customary-law ^{office} occupy an official residence. The office may be political such as a chief or it may be religious, like a priest or Wulɔmɔ. Such occupants are not tenants;¹ they are entitled to live in these official houses because of the nature and/or status of the office they occupy.

Occupation of such residences come to an end with their ceasing to hold office; and the property must be handed over to the 'state'.²

II. The tenancy distinguished from a mortgage.

Until the enactment of the Mortgages Decree, 1972 (N.R.C.D.96)³, the Ghanaian law of mortgages consisted of the common law and any English statutes of general application applicable to Ghana. Under this law a legal mortgage could only be created by conveyance of legal title in the mortgaged property to the mortgagee. The mortgagee held the legal title, though equity protected the beneficial interest of the mortgagor. It was thus accurate for Lindley M.R., at the turn of the century, to define a mortgage as:

" . . . a conveyance of land . . . as security for the payment of a debt or the discharge on some other obligation for which it is given"⁴.

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1. This is not inconsistent with our earlier position. It is no more inconsistent than saying that the Prime Minister is not a tenant of No.10 Downing Street. It is important to note that (like the Prime Minister) these office holders are not employed by the community. They are officers of the Community — servants.
 2. The analogous situation of the removal vans in front of No.10 the morning after a general election is now notorious.
 3. By S.26 the Decree came into force on January 1, 1973.
 4. Santley v. Wilde [1892] 2 Ch.479.

The pre-1973 mortgage is similar to the residential tenancy in that both arrangements involved the transfer of an interest in property. But in a mortgage this is to secure the payment of a debt or other obligation, while in a tenancy it is for the occupation of the tenant. While the legal mode of creation was the same, therefore, the function of the two arrangements is very much different. Furthermore while a mortgagee had an equitable beneficial interest in the property, the tenancy relationship produced no such equity in the landlord; the landlord had only a reversion.

The Mortgages Decree, 1972 rejects the thesis that a mortgage entails conveyance of legal title to the mortgagee.* It recognises that a mortgage is essentially a security transaction which is aimed at ensuring payment of the debt. Section 1 (i) defines a mortgage as:

" . . . a contract charging immovable property as security for the due repayment of debt and any interest accruing thereon or for the performance of some other obligation for which it is given".

The Decree further stipulates that a mortgage does not give rise to a new ownership interest and, ex abundanti cautela, provides that:

" . . . a mortgage shall be an encumbrance on the property charged and shall not . . . operate so as to change the ownership, right to possession or other interest (whether present or future) in the property charged"¹.

The effect of these provisions is to retain title and possession in the mortgagor despite the creation of the mortgage. Hence from 1973, conveyance of legal title to the mortgagee is no longer necessary in ^{the} creation of a mortgage². This contrasts (at the historical or legalistic level) with the creation of a tenancy, where transfer of title is essential. A consequence of this is that a mortgage is only an encumbrance on property charged while a tenancy creates an interest in land.

1. N.R.C.D.96, S.1 (2).

2. This method for the creation of legal mortgages of leasehold property is still possible in England under section 86 (1) of the Law of Property Act 1925. Under the Law of Property Act, 1925, S.86 (1) a legal mortgage of freehold property can be created by a demise for a term of years, subject to a proviso for cesser on redemption.

* For an account of the present law on mortgages, see K. L. D. J., "The Modern Ghanaian law of mortgages", (1974) 11 U. G. L. J. 1.

At the more functional level, it must be emphasized that the two institutions are both socio-economic arrangements. The mortgage arrangement like the tenancy may be used for the provision of accommodation. A person not having all the capital to build or buy a house on his own may enter into an arrangement with a lender by which he is given a loan to build or buy a house. The loan (the mortgage debt) is then secured with the house. In this case the mortgagor has used the mortgage institution as an arrangement for providing himself with accommodation. The mortgagor has possession of the house (the mortgagee may be granted possession if the mortgagor defaults in the payment of the loan). Payment of the loan (the mortgage debt) is normally by way of monthly instalments¹.

It should be clear that in this functional manifestation the mortgage is not much different from the tenancy. All tenants require accommodation. The position of the landlord and the mortgagee appears different at first glance, the one providing housing the other money, but careful consideration reveals that they both provide a needy person with a facility. The factor motivating both landlord and mortgagee is the same; profit. The need of most tenants and mortgagors is also the same, housing. That the tenancy and mortgage are different institutional arrangements aimed at solving a common problem (that of people who cannot acquire housing solely out of their own resources) is evidenced by the fact that the tenancy relationship (as an institutional arrangement for the provision of housing) plays a more important role in societies where mortgage funds are limited or notⁿ existent. Commenting on man's struggle for shelter in an urbanizing world, Abrams has noted:

"In the more developed areas, the mortgage system enables most families to buy houses with a reasonable down payment and monthly payments for twenty to forty-five years.

Subsidies are generally available there for lower-income families. But in the underdeveloped areas, where the average family has small savings, a house must usually be paid for outright . . . "2.

1. Not much different from rent.

2. Abrams, C., Man's Struggle for Shelter in an Urbanizing World, Cambridge, Massachusetts, 1964.

Where purchasing or building outright is impossible and public housing is almost non-existent, renting is the only alternative.

But it should not be supposed that this (provision of accommodation to the mortgagor and of profit to the mortgagee) is the only way in which the mortgage institution manifests itself at the functional level. It may also be used by a houseowner who, for some reason or other, requires finance. The houseowner receives a loan from a moneylender or loan-institution and he uses his house as security for the payment of the loan. It is quite clear that in this arrangement the mortgagor is not motivated by the need for housing. What he requires is finance; and for this he mortgages his house.

III. A new kind of charge?

A new, less documented institutional arrangement is being increasingly used in the desperate housing situation in urban Ghana. It is an arrangement which has been necessitated by the difficult economic circumstances of Ghana and of most Ghanaians, and the monumental outlay of capital involved in building a house only to realise (before completion) that they have not the resources to finish building. What is happening is that the person building the house enters into an arrangement with another person with the resources to complete or make money available for completion of the house. The grantor (i.e., of the money), under the agreement, lives in the completed house for a number of years.

It is quite clear that this is one of the institutional arrangements for the provision of housing in a country where so many people cannot own their accommodation. But what is the legal nature of this institutional arrangement? It may perhaps be helpful to distinguish this arrangement from the transaction in Sbaiti v. Samarasinghe². In the latter case, the defendant entered into an oral agreement with the plaintiff to let him premises then uncompleted for use as a school. The agreement was to let the premises for a five-year term at an annual rent of £ 5,000. The agreement, like many such in Ghana, was not reduced into writing; but a note confirmatory of the grant was prepared by the defendant to show to the Ministry of Education. To ensure early completion of the building, the plaintiff supplied building materials worth £ 8,000.

2. [1976] 2 G.L.R.361.

When the premises were completed the defendant refused to give possession to the plaintiff, who then sued for specific performance. The application for specific performance was granted by the High Court. The court held that though the agreement was never reduced into writing, the evidence clearly showed the essential terms of a tenancy. And since the defendant had benefited under the contract (the cost of the building materials being used to offset rent) an equity has been created in favour of the plaintiff and the defendant should perform her part of the contract.

The agreement in Sbaiti v. Samarasinghe¹ was for the grant of a tenancy. It was only to ensure speedy completion of the premises that the plaintiff provided the building materials for the completion of the main premises while occupying the out-house. There was thus a prior tenancy agreement; and it was not even a term of the agreement that the tenant provided building materials.

While recognising the functional similarity of the economic arrangements in Sbaiti v. Samarasinghe and the kind of charge being examined, it is submitted that there are legal differences in the two arrangements. It is important to note that in the arrangement being examined there is no prior relationship before the agreement to complete the house. There is only one single agreement in which a person agrees to complete a house so that he will live in the house for a period of time². It would be much too sophisticated and a distortion to see the arrangement as in fact two separate transactions; the first, a simple loan transaction, and the second, a residential tenancy with the loan as rent paid in advance. Secondly, and perhaps more importantly, discussion with some of the parties to such arrangements indicated that they do not regard their

1. op.cit.

2. The period of time is normally calculated on the basis of the money spent and the unexpressed interest (usually 50%) and what the parties regard as the usual consideration for living in a similar house. To this is added a number of extra years for the goodwill of the grantor. Under the Money-lenders Ordinance (No.21), 1946, the lending of money at an interest or for profit by unregistered persons is prohibited. This may explain the reluctance of parties to some of these arrangements to allow documents evidencing the transaction to be photocopied.

relationship as one of landlord and tenant¹. The grantor/occupier is regarded as being entitled to live in the house in his own right for the agreed period.

It is also inaccurate to regard the arrangement as a simple loan transaction. The whole basis of this arrangement is completion of the house on the understanding that the grantor will live in the house for an agreed period of time. There can thus be no question of the grantor being, for some reason or other, paid his money - the principal loan and the unexpressed interest. This would not only be unjust as being contrary to the intention of the parties, but would (in the concrete context of the housing situation in urban Ghana) work considerable hardship on the grantor because of the difficulty he would have in securing suitable alternative accommodation.

Can it be regarded as a mortgage transaction? This would be inaccurate. In the arrangement being analysed the grantor is placed in occupation on the completion of the premises. This would negate the existence of the mortgagor/mortgagee relationship. In Norh v, Gbedemah², illiterate parties to a transaction thumbprinted a document which was expressed to be a mortgage. But the document stipulated that the creditor be put in possession of the property. It was held that this was not a mortgage transaction. Furthermore, a mortgage is not to operate so as to change the right to possession of the mortgagor³ nor can the mortgagee enter into possession if the mortgagor has not defaulted in paying the mortgage debt⁴. The effect of these provisions is that a transaction which is founded on the creditor going into possession is not a mortgage.

The arrangement being analysed creates a charge which operates as an encumbrance on the property. But the property is not security for a loan. The property is actually to be enjoyed in satisfaction of what the creditor has spent in completing the building. It is thus submitted that this arrangement is a variant of the customary-law self-liquidating pledge.

1. Though their opinion as to the legal nature of their arrangement is not conclusive, it is worthy of some importance.

2. (1919) F.C. 26-29, 395.

3. Mortgages Decree, 1972 (N.R.C.D.96), S.1.

4. *ibid.*, S.1 (2) and 17 (1).

IV. The tenancy and the pledge.

The institution of giving one's property as security for a loan is of ancient vintage in the customary law¹. In the Ghanaian customary law the use of immovable property as security for a loan has been called the customary-law pledge².

The self-liquidating pledge is a relatively recent development - a development resulting from the more permanent development and appropriation of land (cocoa, coffee and timber instead of yam, pepper, etc., and cement and aluminium-roofed houses instead of earth and thatch) and a more commercial environment³.

In the self-liquidating pledge of a house the pledgee lives in the house for an agreed period of time. The debt is considered as extinguished after a fixed term and the pledged property is returned to the pledgor. Interest is charged on the loan in practically every case; but to circumvent the law⁴ the loan is described as interest-free even in any document or memorandum evidencing the transaction. The rate of interest, according to information, is usually fifty per cent. In fixing the period of time for which the creditor will live in the house the money spent is added to the unexpressed interest. The parties then take into account what would be regarded as the normal rent for that type of accommodation. On the expiry of the agreed term the debt is considered as automatically extinguished.

An essential requirement of this arrangement is that the pledgee is given possession. If the grantor is not given possession then it would be considered as a simple loan transaction or a mortgage⁵. In Asafu Adjei v. Yaw Dabanka, a security transaction by deed contained this clause;

1. Danquah, J.B., Akan Laws and Customs and the Akim Abuakwa Coustitution, London, 1928, p.219; Ollennu, op.cit., p.79.

2. See Ollennu, N.A., Principles of Customary Land Law in Ghana, London, 1962 p.94-95; Kludze, A.K.P., Ewe Law of Property, London, 1973, pp.237-248.

3. See Kludze, A.K.P., supra, esp. pp.245-248; Bentsi - Enchill, K., op.cit., pp.372-399.

4. The Moneylenders Ordinance (No.21), 1946 which prohibits money-lending at a profit by unregistered persons.

5. It has been argued that this stereotyped approach to customary law charges is erroneous: See Bentsi - Enchill, K., op.cit., pp.372-399; Allott, A.N., Akan Law of Property, op.cit., p.440.

"That the said building shall remain in the possession, use and control of the mortgagor who shall also draw and receive all rents accruing therefrom until the end of the year from the date of these presents".

It was held that the transaction was an equitable mortgage and not a pledge, said Michelin, J. :

"It is an essential element of the native mortgage that possession of the mortgaged premises should be given to the mortgagee at the time when the transaction takes place between the parties"¹.

While in possession the pledgee is not accountable to the pledgor. The pledgee stays in the premises in satisfaction of the money spent in completing the house (and the unexpressed interest).

An issue of extreme importance is whether this type of self-liquidating pledge is redeemable before the expiry of the fixed term. Writing about self-liquidating pledges of farms, Kludze says:

"A pledge for a fixed term of years unless expressly stated otherwise, is redeemable at any time by the pledgor tendering the whole of the original debt"².

It is submitted that this statement of the law is not appropriate to the arrangement being analysed and should be restricted to pledges of farms and creeks upon which Amusu v. Fenuku³ was decided. The self-liquidating pledge of houses is based on the understanding that the creditor will live in the house for the whole of the agreed term. The arrangement should be considered within the context of the acute shortage of rental accommodation and the arrangement (from the creditor's view point) is to secure accommodation for a period of time.

1. (1930) 1 W.A.C.A.63, 66.

2. Kludze, A.K.P., Ewe Law of Property, London, 1973, 247. The authority cited by Kludze for this statement of the law is Amusu v. Fenuku (1952) D.C.(Land) : '52-55, 75.

3. Supra.

It would not only be unjust, but would result in serious hardship (because of the difficulty of securing suitable alternative accommodation) if the property is redeemed before the expiry of the agreed term. The law should, therefore, hold the pledgor to his agreement and prevent him from redeeming the property before the time agreed on.

The functional similarity between the self-liquidating pledge and a tenancy for a fixed term (particularly those in which rent is paid, albeit illegally, years in advance) is striking¹. The legal nature of particular transactions would be a fine matter of judgment to be made by the courts in individual cases. It is largely a question of the intention of the parties to be derived from the concrete facts of individual arrangements.

V. The tenancy and the rights of a member in "family house".

Discussion of this branch of the customary land law has often been obscured by the injudicious use of terms like "family" and "family house". While recognising that definition is often a question of choice not of abstract logic, it is submitted that it would make for much clearer analysis if "family house" is restricted to cases where the whole family (as a corporate entity) has title to a house². Where specified members of the family succeed to property (as for example, when children of an Osu man inherit their father's house under the intestacy rules of Osu customary law³) it is not helpful to refer to the property as a "family house"⁴. In short the assertion normally made that on the death ~~intestate~~ of a Ghanaian his property becomes "family property" is not considered illuminating. Without identifying what constitutes 'family' in individual cases the statement tells us very little. That being the case the reference to the family should be skipped; in particular customary law contexts investigation should focus on who exactly inherit what.

The administrative/judicial functions of the family should also not be confused with succession-rights. The family, acting as a court of probate, may adjust the rights of successors in certain cases, and determine what particular items go to each of the successors but this should not be interpreted to mean

1. See Sbaiti v. Samarasinghe [1976] 2 G.L.R.361.

2. For the concept of corporate bodies in the customary law: See Woodman, G.R. "The family as a corporation in Ghanaian and Nigerian Law", (1974)

11 Afr.L.Std. 1 and Allott, A.N., "Legal personality in African Law", in Ghickman, M.(ed.), Ideas and Procedures in African Customary Law, op.cit., p179.

3. See Coleman v. Shang [1961] G.L.R.145.

that it is the family who determines who should inherit property. There are clear rules of inheritance; the family has no fiat. These rules may only be departed from in a clear and demonstrable cases. This function of the family is no different from the power of a court of probate to vary the will of a testator in order to provide for some one not provided for or determine the entitlements of successors¹.

"Family house" is, therefore, used in this section to refer to houses held corporately by the family. Though the house is held corporately by the family, the day-to-day administration is vested in the head of family. The head of family may delegate his functions to another member of the family.

These houses were either built some years past by the ancestor of the family or more recently by money and effort contributed by the whole family². It may also have passed to the family because a member of the family built on land appropriated by the family³.

Where title to a house is held by a family, then any member of the family is entitled as of right to a room⁴. In practice, however, a grant has to be made by the head of family or administrator of the property. Though all members of the family have an undifferentiated right of residence, occupancy of specific portions is always the result of a grant. Members are rationed in the number of rooms they may be granted. Since members of a family, almost invariably, outnumber the rooms in a family house, the head of family or family council decides on who should live in the house and who not. The right of the member, writes Allott:

" . . . is only a right to be accommodated if possible, and not a vested right entitling him to take possession of a room without prior permission"⁵.

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- contd. 4. See Kludze, A.K.P., Ewe Law of Property, op.cit., pp.256-314 ; "Problems of intestate succession in Ghana", (197) 9 U.G.L.J.89.
1. See Kludze, A.K.P., Ewe Law of Property, op.cit., Chap.13. esp. pp.
2. For the acquisition of family property generally: See Ollennu, N.A., op.cit., pp.34-35; Allott, A.N.; The Akan Law of Property, op.cit., pp. 258-281 ; Kludze, A.K.P., Ewe Law of Property, op.cit.; Bentsi-Enchill, K., op.cit., pp. 249-60.
3. See Amissah-Abadoo v. Abadoo [1974] 1 G.L.R.110.
4. Tetteh v. Malm [1959] 1 G.L.R.368.
5. The Akan Law of Property, op.cit., p.278.

The member of the family has occupancy of the part of the family house which he occupies. He has no individual interest in the house or indeed of the room he occupies, except as a member of the corporate family which has title to the house. A member's occupancy is for an unlimited time as long as he conforms to the directives of the head of family or other person managing the house. He must be loyal to the family and not deny the title of the family. If he so behaves himself, his right of occupancy is quite secure.

It must be emphasised^s that these are family arrangements, and that the member of the family usually outnumber the available rooms. The people who are to live in the family house is, therefore, reviewed as the social conditions of members change. A member who while living in a family house acquires his own house, may be prevailed upon to vacate his room in favour of a needier member. This does not mean that the previous occupant has lost his inherent right to reside in the family house. This is an indefeasible right flowing automatically from membership of the family. It only means that the family (acting through the head of family or a council of elders or a general meeting) thinks that another member of the family has a stronger case for living in the family house.

Members living in the family house have a duty of diligence and care and are required to make contributions to minor repairs to the house. Major structural repairs and remodelling are, however, undertaken by the family as a whole.

The general principle of this branch of the law is that a member cannot alienate the room he occupies². But children of the occupant (where members of the family) have a right to continue living in the room on the death of their father³.

The member living in a family house is not a tenant of either the head of family or administrator of the house, nor of the whole family. He is a member of the family which has title to the house; and he has an inherent undifferentiated right to live in the house⁴.

1. See Allott, A.N., The Akan of Property, op.cit., p.279.

2. See Lokko v. Konklofi (1907) Ren,451.

3. Richardson v. Fynn (1909). Earn. 13.

4. It would be inaccurate to describe him as a licensee (as used in English law).

A tenant, however, has no inherent legal right to the grant of accommodation. His right to occupy premises derives from contract (between him and the landlord), not status.

C. Types of Tenancies

Having identified the central feature of the urban residential tenancy and having compared and contrasted it with other institutional arrangements for the provision of housing the various types of residential tenancy are now examined.

I. Tenancies for a fixed term?

A tenancy may be granted for any period of time, no matter how long or how short. There may be tenancies for ninety-nine years, for ten years, or three years. The common law still retains the doctrine that the duration of such a term must be certain, i.e., that the parties must be agreed on the dates for the commencement and determination of a proposed tenancy¹. Such agreement may be established by reliance on the maxim;

id certum est quod certum reddi potest.

But introduction of security of tenure legislation which restricts the landlord's common-law rights of eviction (in Ghana and in England) has rendered somewhat hollow this supposed requirement of certainty. Under these security of tenure provisions, though the contractual tenancy may have determined, the tenant remains in possession as a statutory tenant unless the landlord gets an eviction order by satisfying one of the requirements of the Rent Act, 1963².

A functional analysis, therefore, shows that the tenancy is not for a fixed or certain term. It may continue for much longer. The agreed term is not a certain term, but a minimum term.

II. Concurrent tenancies

A concurrent tenancy is one granted for a term which is to commence on the expiration or other determination of a previous tenancy of the same premises to another³.

1. See Harvey v. Platt [1965] 1 W.L.R.1025.; Lace v. Chantler [1944] K.B.368 at 370.

2. See *infra*, pp.306-332.

3. This type of tenancy is hardly created in Ghana. It only occurs when getting to the end of an existing tenancy (but before the tenancy has expired) the landlord grants tenancy of the same premises to another person.

Such a tenancy is said to take effect in reversion¹. It creates a landlord/tenant relationship between the first and second tenants and supplants the relationship between the original landlord and the first tenant².

III. Periodic tenancies³

In traditional legal analysis a periodic tenancy is said to differ fundamentally from a tenancy for a fixed term because the former continues automatically from period to period until determined by notice. But it must be pointed out that in these days of Rent Acts and 'security of tenure' the practical effect of the two arrangement may, in certain cases, not be that much different.

A periodic tenancy is one from period to period; it has the feature of perpetual renewability unless determined (after which a statutory tenancy may be created unless the landlord gets an eviction order). The 'period' may be a year, a month, a half-year or a quarter. Monthly tenancies predominate in Ghana⁴. Weekly tenancies which are prevalent in the United Kingdom are non-existent⁵. In English law there has been lively controversy about what constitutes a 'year', 'month' or 'week'. Technical rules have developed on this issue; but these rules do not necessarily apply to Ghana⁶.

Periodic tenancies may be created either expressly or impliedly. In Ghana, it is usually by implication. A periodic tenancy arises by implication whenever a person occupies premises and pays rent measured by reference to a period⁷. The implication is, however, rebutted if there is sufficient evidence to show that some other kind of tenancy was intended. A tenant who holds over after the determination of a fixed-term (?) tenancy may become a tenant at will or on sufferance (the security of tenure provisions render this possibility rare).

1. See Neale v. Mackenzie (1836) 1 M & W.747.; Cole v. Kelly [1920] 2 K.B.106.

2. See Wordsley Brewery Co. v. Halford (1903) 90 L.T.89.

3. This is the most prevalent type of residential tenancy in Ghana. In the survey carried out by the present writer 1,658 out of the 2,000 tenancies (about 80%) were periodic tenancies. In Allamedine Bros. v. P.Z. [1971] 2 G.L.R.403, 411, Sowah J.A. observed that the bulk of tenancies in Ghana were monthly tenancies.

4. *ibid.*, This is largely because rent is calculated on a monthly basis — a product of the fact that generally wages and salaries are paid monthly.

5. *ibid.*, : See Allamedine Bros. v. P.Z., *op.cit.*, at 410.

6. See Allamedine Bros. v. P.Z., *op.cit.*, pp.409-410.

7. Carroll v. Andrews (1956) 1 W.A.L.R.176, 179.; Ramia v. Mouissie (1945) O.C.(Land)
'38-47, 177.

A tenancy at will may easily become a periodic tenancy by the tenant paying rent upon some regular periodical basis. But it must be emphasized that the important consideration is the intention of the parties to be inferred from all the circumstances, for, as Ademola C.J. held in Oshinfekun v. Lana¹ a periodic tenancy is created not by payment of rent but by consensus between parties.

A periodic tenancy may also arise by implication of law where a person is let into possession under a void lease or an agreement to create a tenancy and then pays rent upon some regular periodical basis². A person in occupation under a specifically enforceable contract³ may, however, have an equitable lease. He is considered as having a tenancy from the time of entry and upon the same terms as if the lease had been granted⁴.

a. Computation of the 'period' and the frequency of rent days.

The test for determining whether a periodic tenancy is a yearly, monthly or other tenancy is the period by reference to which the parties calculated rent, rather than the times at which rent is actually paid. There is a distinction between a quarterly or monthly instalment of a yearly rent and a quarterly or monthly rent. Thus an agreement for premises at "£ 6,000 per annum payable at £ 500 monthly", prima facie, creates a yearly tenancy while one for premises at "£ 500 a month" creates a monthly tenancy. The law was thus stated in Allamedine Bros. v. Paterson Zochonis⁵:

"In my opinion it is not the mode of payment that should determine the nature of a tenancy. It is rather the basis of computation of rent payable. If the agreement, either written or oral, has as its term that the premises is let at such and such a rent per month or when the rent is paid on the basis of such an amount the presumption in law is that the rental is on a monthly basis. . . .

1. (1955-56) W.M.L.R.93.

2. See Doe d. Rigge v. Bell (1793) 5 T.R.471.

3. *infra*, pp.112-123.

4. *infra*, pp.123-124; Walsh v. Lonsdale (1882) 21 Ch.D.9.; Purchase v. Lichfield Brewery Co. [1915] 1 K.B.184.

5. [1971] 2 G.L.R.403.

A multiplication of the monthly sum and payment of the resultant figure without more in my view does not change the nature of the original tenancy"¹.

IV. The statutory tenancy

The statutory tenancy is not created by contract but by law. In Ghana two classes of statutory tenancy exist.

A statutory tenancy of the first type is created when a tenant:

" . . . remains in possession of premises after the determination by any means of his tenancy and cannot by reason of the provisions of this Act (the Rent Act, 1963) be deprived of such possession by his landlord"².

This refers to a tenant whose tenancy has been terminated but cannot be evicted because his landlord cannot satisfy the requirements of section 17(1) of the Rent Act, 1963 (Act 220).

It is not necessary for the creation of a statutory tenancy that rent be paid and accepted by the landlord³; nor is it necessary that the tenant pay double-rent⁴.

The second type of statutory tenancy arises if before the termination of head-lease the head-lessee has created a lawful sub-lease⁵. The sub-lessee then becomes statutory tenant⁶. It is important that the sub-lease is lawfully created. In Kuntoh v. Joseph⁷, a sub-lease was created in breach of a covenant not to sub-let. It was held that the sub-tenant is not protected⁸.

A statutory tenant (of either type) holds as a tenant from month to month, but on the terms of his original tenancy as far as they are consistent with the provisions of the Rent Act, 1963⁹.

1. op.cit., per Sowah J.A. at 409, quoting from the judgment of the trial magistrate.

2. Rent Act 1963 (Act 220), S.36.

3. Karam & Sons v. Traboulsi & Co., [1964] G.L.R.513.

4. *ibid.*

5. Combined effect of S.36 and S.17 (5) of Act 220.

6. *ibid.*

7. (1955) D.C.(Land) 52-55, 341.

8. For a critique of decisions like Kuntoh v. Joseph, : See *infra*, pp.147-148.

9. Act 220, S.29 (1) (a).

By section 22 (1) of Act 220 a statutory tenant cannot sub-let the premises without the written consent of the landlord. In George Grant v. Tikobo Sawmills Ltd.¹ a statutory tenant purported to assign the premises to a third-party. It was held that a statutory tenancy is a law - protected right of occupancy and that the statutory tenant had no interest in the premises capable of alienation. In statutory tenancies of the second type (sub-tenant holding over after termination of head lease) the tenant is subject to any restrictive covenant between the landlord and the head-lessee².

V. Tenancies at will

"A tenancy at will arises when ~~not~~ a tenant, with the consent of the owner, occupies land as tenant (and not merely as a servant or agent) on the terms that either party may determine the tenancy at any time"³.

The main feature of this arrangement is that either party may determine it at will. This is a reciprocal right enjoyed by both parties; it cannot be extinguished by contrary agreement⁴. The tenancy is determined simply by a demand for possession by the landlord.

At English common law, a tenancy at will may be created either expressly or by implication. In practice, tenancies at will are hardly ever created in Ghana. They normally arise by implication of law. This may happen when there is occupation under a void lease or an agreement for a lease⁵. It has also been held to arise in a case where a person was granted occupation without obligation to pay rent and for no specified length of time⁶. In Safo v. Badu⁷, the law on the creation of tenancies at will was

1. (1969) C.C.118.

2. Act 220, S.29 (1) (a).

3. Megarry, R. and Wade, H.W.R., Law of Real Property, op.cit., p. 658.

4. See Doe d. Price v. Price (1832) 9 Bing 356.; Fox v. Hunter-Paterson [1948] 2 All E.R.813.

5. Othman v. Accra Perfumery Co.Ltd., (1942) 8 W.A.C.173.

6. Safo v. Badu [1977] 2 G.L.R.63.

7. ibid.

thus stated by Korsah, J. :

" . . . a tenancy at will may be created by agreement express or implied, where a person lives in a house rent free by permission of the owner. It may also arise by implication of law where a tenancy from year to year cannot be inferred for example, in the case of an entry under a void lease without any payment of rent or obligation to pay it. Such an estate may be determined by either party by express words or by any act which is inconsistent with the continuance of the tenancy; it is determined as soon as notice thereof reaches the other party"¹.

It is sometimes very difficult to distinguish between a tenancy at will and a licence — another reason for abolishing the tenancy/licence dichotomy.

VI. Tenancy on sufferance

A tenancy by sufferance arises, in English common law, when a tenant holds over, without the consent of the landlord, on the expiry or other determination of a previous tenancy². This legal animal hardly exists in Ghana. Under the Rent Act, 1963 a tenant who cannot be evicted because of the provisions of the Act becomes a statutory tenant³. This type of tenancy can, therefore, only exist if the premises are not covered by the Rent Act, 1963. These are very few indeed⁴.

1. op.cit., at p.67.

2. See Remon v. City of London Real Prop. Co.Ltd., [1921] 1 K.B.49.

3. Supra, pp.87-88.; infra, pp.279-333.

4. infra, pp.237-240.

CHAPTER THREE
THE CREATION OF TENANCIES

A. THE SUBSTANTIVE LAW

I. Capacity to grant tenancies

It may be stated as a general rule, that all persons not under any legal disability may grant tenancies for such periods as are not inconsistent with the nature and quantity of their interest in a house.

The application of this principle does, however, entail enormous difficulty (in individual or groups of cases) because of the system of land holding. It is thus important to consider different kinds of interest in a house in order to locate who may grant a tenancy of that house and for how long. This may in turn be dependent on how the house was built (was it by an individual or two or more members of a family, or the whole family, and on what understanding?) and on the land on which it is built (was the land individually-acquired, is allodial title to the land held by a family or stool, is the land being used by the family?).

The law stated in this section is that of the peoples of southern Ghana, the Ga-Adangbe, the Akan and the Ewe (most of urban Ghana is situate within this area) whose customary land law has been more fully investigated. The law stated in this section is, therefore, not necessarily that of the tribes of the northern and upper regions. The courts and some of the text writers¹ have taken the view that these general principles hold true for the whole country. But Kludze's work² is timely reminder that there may be significant differences in these systems of customary law.

a. Building by an individual on land allodial title to which is held by the stool (Akan and Ga)

It has always been the customary law for a member of a stool to appropriate a piece of unappropriated land (allodial title to which is held by his stool) to his beneficial use. As regards land needed for the purpose of building the trend, in recent times, has been for the traditional authorities to make express grants for the purpose³.

1. For example, Ollenu, N.A., Principles of customary land law in Ghana, op.cit.

2. Kludze, A.K.P., Ewe Law of Property, op.cit.

3. See Oblee v. Armah (1958) 3 W.A.L. 84.

The legal question posed here is, who is the proper legal authority to grant tenancies of such premises? Can the individual who built the house grant a tenancy alone, or does he need the knowledge and/or consent of the stool?

There used to be some doubt about the answers to the above question; and some stools (particularly in Ashanti) insisted that their consent was necessary for a valid grant of tenancy¹.

But it is now well settled that the individual member has the capacity to grant tenancies of such premises without the knowledge and/or consent of the stool². Such tenancies granted by the individual, may continue beyond his life. The law is thus stated by Ollennu:

" . . . an outstanding incident of the determinable estate is that it is inheritable and alienable either by transfer inter vivos or by testamentary disposition"³.

In fact the present law is that an individual can alone sell such property⁴. Building by individual on land allodial title to which is held by his family (Adangme and Ewe).

Writing on the Ewe, Kludze disagrees with the propositions of law (in cases like Thompson v. Mensah⁵ and Total Oil Products Ltd. v. Obeng⁶) that an individual can alienate, either by sale or gift, a house built on such family land⁷. He argues that in Ewe law the individual can only alienate the developments he has made to the land but not the land itself. He can sell the house on the land but not the land itself. Kludze, however, recognises⁸ that with development of land taking a more permanent nature (cocoa and coffee farms rather than cassava and okro farms, and concrete and sandcrete rather than earth and thatch buildings) the distinction he draws (which may have existed in the customary law) is becoming increasingly fictional.

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1. Private conversation with Antony Allott who had carried out field investigation among the Akan.
 2. See Ollennu, N.A.; Principles of customary land law in Ghana, op.cit., p.57; Thompson v. Mensah (1957) 3 W.A.L.R.240; Total Oil Products v. Obeng [1962] 1 G.L.R.228.
 3. Ollennu, N.A.; Principles of customary land law in Ghana, op.cit., p.57.
 4. See Thompson v. Mesah, supra; Total Oil Products v. Obeng, supra.
 5. supra.
 6. supra.
 7. Kludze, A.K.P., Ewe law of property, op.cit., pp.128-130
 8. ibid., pp.130-131.

Despite Kludze's view on the outright alienation of such houses, he impliedly agrees that the individual alone can grant tenancies of such premises¹.

b. Building on land in the occupation of the family

The law is now well - settled that if an individual member of a family builds on land in the occupation of his family (as distinct from unappropriated land to which the family holds the allodial title) then he has only a life interest in the house. Such member may grant a tenancy of the house, but this will not subsist beyond his life². To grant a tenancy, subsisting beyond his life, the member will need the consent of the head and principal members of the family.

This position has crystallised in Amissah Abadoo v. Abadoo³. 'A', with the consent of his family built a house on family land. The portion of land on which he built was part of a site on which was a family house. The particular portion on which he built was used as a play ground by all members of the family and also housed a well-used by the family. The land was thus not unappropriated land but land appropriated to the beneficial use of the family. 'A' purported to dispose of the house by will. It was held by Wiredu J., sitting in the High court, that the purported alienation was void and that the individual member who built the house could not dispose of it beyond his lifetime.

The crucial test is whether the family has appropriated the land to its beneficial use. What constitutes occupation by the family?⁴ In Ollennu's view, the member would only have a life interest if the land on which it was built is "a site on which family structure of any sort exists"⁵. This formulation is too wide⁶. It is suggested that the question whether a family has appropriated land to its use, must be a question of fact to be determined from the circumstances of each particular case.

These propositions of law are supported by the court of Appeal decision in Biney v. Biney⁷.

1. See Ewe Law of Property, op.cit., pp.170-174.

2. See Amissah-Abadoo v. Abadoo [1974] 1 G.L.R.110.

3. ibid.

4. This is very important because of concept of abandonment in customary law. (5.6.7. p.t.o.)

The material facts of this case are that 'A' conveyed his land with buildings thereon to three persons as tenants for life, and thereafter to his four children. The property was known as "Bineyville". The plaintiff was the sole survivor of the remaindermen and the court held that the principle of ius accrescendi operated to vest "Bineyville" in him absolutely. There was, however, another tract of land which was not included in the settlement. This piece of land was, for all practical purposes, treated as part of "Bineyville". With the authorization of the head of family, the plaintiff built on this other piece of land. In an action to partition the property, it was held by the trial judge (which decision was upheld by the Court of Appeal) that the land not included in the settlement had on the death of 'A' become "family land"; and that the plaintiff had only a life interest in the house he built¹. The Court of Appeal held that this is the position whether the individual member built with or without the permission of the family. The only exception is where the member of the family obtains an express grant, in his own right, out of a portion of family land.

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1. Kludze thinks that Biney v. Biney may have laid down a wider principle (affecting unappropriated land to which a family holds the allodial title); vide, "The fate of buildings on family land", [1974] 6 R.G.L.226, 233-243. If Kludze is right this would cast some doubt on the propositions of law in the last two sections. But with respect, he is wrong. Kludze falls into this error because he refers opaquely to "family land" without differentiating and distinguishing the rights of benefit and the powers of control which a family may have in different pieces of land. Admittedly, part of the blame must lie with the Court of Appeal which did not draw these distinctions. If Kludze had drawn this distinction he would not have lumped all lands in which a family has some interest of a sort as 'family land'. He would then have realised that unappropriated land (to which a family holds the allodial title) is 'family land' in a distinctly different sense from appropriated land solely acquired by a member but which has fallen to the family on the death intestate of the member. The two should be analysed separately. It was with the latter (appropriated land) that the court was concerned in Biney v. Biney. It could not conceivably have made statements of law about the former (unappropriated land).
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Cont.

5. Ollennu, N.A., Principles of customary land law in Ghana, op.cit.,
6. See Amissah-Abadoo v. Abadoo, supra, per Wiredu J. at 125-126.
7. [1974] 1 G.L.R.318

c. Building with the help of the Family or some members of it.

It is now well settled that a house does not lose its quality as solely-acquired property simply because the individual member of the family received some help from the family or some members of it. It is now the view that the important consideration must be the intention of the parties¹. In determining the intention of the parties, an important factor would be the nature and extent of the assistance offered by the family or some members of the family. In Codjoe v. Kwatchey², the builder had used wood, roofing material and a gate from a demolished 'family house', in building his own house. He also received £100 from the family, part of which went directly into the building of the house. The rest he used in trading, the profits from which also went into building the house. On account of these facts it was contended that the individual member had only a life-interest only, in the house. This contention was rejected by the trial judge, who said³:

"Is any assistance in money or in kind, however slight, sufficient to impress a block of buildings worth thousands of pounds, otherwise erected by a man entirely at his own expense and on a valuable land he himself has purchased, with the character of family property? Surely there must be some limit . . . and I venture to suggest as such a limit, the proviso that the family's contribution, whether in money or in kind, must be a substantial contribution before the court will hold that the whole of the land and buildings in question in any case have been thereby impressed with the character of family property. What will amount to substantial contribution must, of course, always be a question of fact depending on the particular circumstances of every case".

On appeal to the West African Court of Appeal, Kingdon C.J., dissented from the test enunciated by the trial judge, but the decision of the trial judge was unanimously upheld.

1. See Woodman, G.R., "The Acquisition of Family Land" (1963), 7 J.A.L.131.

2. (1935) 2 W.A.C.A.371.

3. Quoted in Codjoe v. Kwatchey, *op.cit.*, at 377

That the intention of the parties is the decisive factor is made clear by the decision in Larbi v. Cato¹. In this case the legal education of the individual member who built the house, had been financed from the proceeds of a family farm. Out of the fees earned from his legal practice he erected a building on land purchased from his own resources. In building the house, he also used a small amount of money, received by him as his personal share from the proceeds of a family cocoa farm. It was contended that the individual member had a life interest only, in the house. This argument was rejected by the trial judge, who said²:

"In my opinion, however, it would be repugnant and contrary to all principles of natural justice and good conscience to hold in modern days that where, for example, a man employs contractors to build on his land, the house so built would become family property simply because one member or another of the family occasionally visited the site of the work when it was in progress, and casually carried a pail of water, a piece of brick, or helped the contractor's labourers to lift a board or so. I should take the same view where a member of the family gave the member building on his own land some temporary financial assistance to an amount which was insignificant when considered in relation to the actual cost of the building".

In the Court of Appeal, this view was not upheld, though the appeal against the decision was dismissed.³ The court said:

" . . . although we agree that according to the best authority a real contribution towards the building of a family house, need not be substantial in the accepted sense of the word it must be a real contribution and cannot accede to the view that customary law is a stranger to the doctrine 'de minimis non curat lex'".⁴

An indication of the proper criterion was given when the Court of Appeal said:

1. [1959] G.L.R.35.

2. *ibid*, 37-38.

3. [1960] G.L.R.146, at p.154.

4. *ibid.*, p.152.

"We do not doubt for one moment that those family members who make contribution to the building of a house are entitled to share the enjoyment of the building but this is and must be, on the basis that by accepting support and contribution from the family, the builder recognises that he is building a house for the family".

The nature and extent of the assistance of the family or some members of it is, however, very important. This is because the intention of the parties is to be determined objectively from all the circumstances of the case — and the contribution of the family or some members of it, is a very important fact.

In determining the intention of the parties, we suggest, that the court should have regard to the changed and changing social and economic conditions — with its emphasis on individual acquisition and enjoyment of property¹. In this connection, we suggest, that the principle that " . . . the presumption with regard to land in this country is that it is family property"² should not be applied in such circumstances.

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1. Judicial notice was taken of the changed and changing social and economic facts in Abadoo v. Awotwi [1973] 1 G.L.R.393 Edward Wiredu J., had this to say when considering the question whether an individual needed the consent of his family when alienating his solely - acquired property:

"For sometime now the customary law has undergone considerable changes . . . The requirement of the family's consent to perfect any form of alienation is no longer good law and is now dead and buried. No attempt should, therefore, be made to resurrect it. With this apart, that requirement does not reflect the present social changes which are now apparent in Ghanaian society about modes of acquisition of property which are unlike the past . . . The development of money economy has introduced other means of assisting in the acquisition of wealth so that it will be contrary to reasoning to enforce the claim of the family to have a say in respect of property, when they may even not know how it was acquired".

2. United Products Ltd. v. Afari (1929) Div.Ct. 29-31,11 at p.12.. In Codjoe v. Kwatchey, (supra) at 378, Kingdon C.J.

d. Family-house

It has been seen that there are certain circumstances in which title to a house is held by the family as a unit. There are also cases where the family builds a house out of its resources. Such houses are seldom the subject of a tenancy, the usual practice being for such houses to be occupied by members of the family.

But it is not impossible for such houses to be let. Who is the proper authority to grant tenancies of such houses? The competent authority to grant tenancies of such houses or rooms therein is the head of family acting with the consent and concurrence of the principal member or elders of the family. A grant purported to be made by a person or body of persons other than the head and principal members is void ab initio¹. There may be cases though where the family may be estopped from denying the validity of a grant not made by the competent body as a result of its acquiescence or laches.

II. To whom may tenancies be granted

Every person who is not rendered incompetent by a legal 'disability' is capable of being a tenant. By disability is meant any restriction upon or bar to a person's right to deal with property or enter into contractual relations.

though that the presumption was "not nearly so strong" as it had been. But in Larbi v. Cato (supra) the Court of Appeal said it still existed.

1. There has been considerable controversy in the case law and by academics on whether different permutations of irregular grants are void or voidable. This controversy is not central to this study and will not be joined. Interested readers may consult Kludze, Ewe Law of Property, op.cit., 198-207.; Ollennu, Principles of Customary Land Law in Ghana, op.cit., 127-130.; Bentsi-Enchill, Ghana Land Law, op.cit., 49-59.; Woodman, G.R., "The alienation of family land in Ghana", (1964) 1 U.G.L.J.23.; Kom, E.D., "Unlawful disposition of family land - void or voidable", (1967) 4 U.G.L.J.111.

B. THE FORMAL REQUIREMENTS

The formalities for the creation of tenancies are governed by the Conveyancing Decree, 1973 (N.R.C.D.175). The Decree came into force on 1st January 1974¹. The Conveyancing Decree, 1973 is one of several recent Ghanaian statutes aimed at reform of aspects of the land law. Much of the Decree is a re-enactment, with amendments and rephrasing, of various sections of the English Law of Property Act, 1925². The provisions of the Decree regarding the formalities for the creation of tenancies are not therefore novel and much of the old law is still applicable; the Decree is not a code and one has to rely on prior decisions to construct a complete picture of the formal requirements.

'Conveyance' is defined in the interpretation section as including:

" . . . any document in writing by which an interest in land is transferred, an oral grant under customary law duly recorded in accordance with this Decree, a lease, disclaimer, release and every other assurance of property or an interest therein by any instrument except a will"³.

'Land' is defined to include "any house, building or structure whatsoever"⁴.

It is submitted that these provisions are sufficiently wide to cover all residential tenancies.

I. Leases for three years or more

The Decree provides that:

"A transfer of an interest in land shall be by writing signed by the person making the transfer or ^{his} by agent duly authorised in writing"⁵.

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1. S.46. Prior to the enactment of the Decree, the position was governed by the Statute of Frauds, 1677 and the Real Property Act, 1845. These two imperial Acts were statutes of general application, applicable in Ghana before 1974.
 2. Various sections of the Law of Property Act, 1925 were made applicable to Ghana by section III (1) of the Courts Act, 1971 (Act 372).
 3. S.45. (emphasis supplied).
 4. *ibid*.
 5. N.R.C.D.175, S.1 (1)

This applies to a tenancy for three years or more, though the tenancy is determinable within three years¹. A lease for three years or more must, therefore, be in writing. The writing must be signed by the landlord or by his agent duly authorised in writing. A departure from the old law is that sealing shall not be necessary for documents executed by individual persons². The conveyance (?) must be executed in the presence of one witness who must attest to it³.

II. Tenancies for less than three years

The requirement of writing is dispensed with when a tenancy takes effect in possession and is for a period of less than three years⁴. This is so whether or not the tenant has the power or option to extend the duration of the tenancy⁵. Periodic tenancies are considered as tenancies for less than three years⁶. This is so despite the fact that if not determined by notice (and in accordance with section 17 of the Rent Act, 1963) it will endure for more than three years. Most tenancies in Ghana are created under this rubric, orally and informally⁷.

A tenancy taking effect in possession is to be distinguished from one taking effect in reversion. An example of the latter is a tenancy granted today, but which provides that the tenant will move into the premises in a month's time. This is to be differentiated from a contract to grant a tenancy in a month's time⁸. With the former the tenancy has been created, but the tenant will not move into the premises till after a month; with the latter, the parties agree to create a tenancy in a month's time, possession being granted immediately on creation. Possession is not confined to physical occupation but includes the payment and receipt of rent.

1. See Kushner v. Law Society [1952] 1 All E.R.404.

2. Conveyancing Decree, 1973 (N.R.C.D.175), S.40 (2).

3. *ibid.*, S.40 (1).

4. *ibid.*, S.3 (1) (f).

5. *ibid.*, S.3 (1) (f).

6. See Allamedine Bros. v. Paterson Zochonis, *op.cit.*; Hammond v. Farrow [1904] 2 K.B.332.

7. *supra*, pp. 85-87.

8. It must be noted that by section 2 of the Conveyancing Decree, 1973, a contract for a tenancy not evidenced in writing is unenforceable, unless supported by a sufficient act of part performance.

III. Creation by estoppel

By section 3 (2) of the Conveyancing Decree, 1973, the requirement of writing in the creation of leases:

" . . . shall be subject to the rules of equity, including the rules relating to unconscionability, fraud duress and part performance . . ."

It is, therefore, submitted that tenancies can still be created by estoppel - estoppel coming under the general rubric of "unconscionability".

Estoppel, in this context, has been defined as:

" . . . a principle of the law of evidence which . . . precludes parties who have created a tenancy from denying their respective capacities as against one another"¹.

Under this principle a person who purports to grant a tenancy, though he has no such right, and a person who takes such a grant with knowledge of the landlord's incapacity, will be estopped from denying the creation of a tenancy. A tenancy by estoppel, however, binds only the parties to the transaction (and their successors and assigns) but not third parties.

IV. Operation of an invalid lease as a contract for a tenancy

A lease for three years or more, if created otherwise than in accordance with section 1 of the Conveyancing Decree, 1973, will be construed as a contract for a tenancy². Since a contract for a tenancy has to be in writing and signed by the grantor or his duly authorised agent³, the only possible instance where a purported lease can serve as a contract for a tenancy is where either the purported lease is signed by an agent whose authorisation was not in writing⁴, or the lease was not executed in the presence of a witness who attested to it⁵.

The contract for a tenancy is created only if the constituents of an enforceable agreement are present⁶.

1. Megarry, R. and Wade, H.W.R., op.cit., p.645.

2. See Parker v. Tasswell (1858) 2 De.G. & J.559.

3. Conveyancing Decree, 1973, (N.R.C.D.175), S.2 (a).

4. By section 1 (1) of the Conveyancing Decree, 1973, the authorisation of an agent who signs a lease must be in writing.

5. By section 40 (1) of the Decree, a tenancy must be executed in the presence of at least one witness, who must attest to it.

6. See *infra*, pp.102-104.

V. Contract For a Tenancy

a. Distinction Between a Lease and a Contract for a Tenancy

The distinction between a lease and a contract to create a tenancy is that a lease is the actual conveyance by which the transfer of interest in the premises from the landlord to the tenant is effected, while a contract to create a tenancy is a binding agreement between the parties - the one to transfer interest in the premises, the other to accept such transfer of interest. The distinction has been so put by Woodfall;

"A contract for a lease is an agreement enforceable in law whereby one party agrees to grant and another to take a lease . . . A contract for a lease is to be distinguished from a lease, because a lease is actually the conveyance of an estate in land, whereas a contract for a lease is merely an agreement that such a conveyance shall be entered into at a future date".

Whether a document operates as a lease or an agreement to create a tenancy depends on the intention of the parties, which intention must be ascertained from all the relevant circumstances².

b. Formal Requirements

The Conveyancing Decree, 1973, provides that:³

"No contract for the transfer of an interest in land shall be enforceable unless -

(a) it is evidenced in writing signed by the person against whom the contract is to be proved or by a person who was authorised to sign on behalf of such person".

The statutory requirement is that either the contract itself, or some memorandum or note thereof is in writing. In the first case the writing is the actual contract between the parties. In the second, the contract is entered into orally and the writing is only a note or memorandum evidencing the already concluded contract.

1. Woodfall, op.cit., p.127.

2. Gore v. Lloyd (1844) 12 M & W 463; Sidebotham v. Holland [1895] 1 Q.B.378, 385.

3. Conveyancing Decree, 1973, S.2 (a).

A contract to create a tenancy, to be enforceable, must be in writing or must be evidenced in writing¹. Failure to comply with the requirement of writing renders a contract unenforceable - unless the contract is supported by a sufficient act of part performance. In Akwei v. Agyapong² the plaintiff sued for trespass and recovery of possession of his land. The defendant relied on the fact that they had entered into a prior oral agreement for the sale of the land. This contention was rejected by Ollennu J., because the prior oral agreement was neither in writing nor was it evidenced by writing as required by law.³

The writing must be signed by the intended landlord and tenant— since it is impossible to know against whom it will be sought to enforce the contract — or a person authorised to sign on their behalf. The authorisation need not be in writing⁴.

c. There Must Be a Complete Contract.

A contract to create a tenancy to be enforceable must, like any other contract, satisfy the general principles of contract law. To constitute a concluded contract, there must be an offer by the intending landlord to let and an unconditional acceptance by the intending tenant. The agreement must be supported by consideration and there must be an intention to enter into legal relations.

A contract to create a tenancy, to be complete, must include agreement on some essential issues.

1. Rent

There must be agreement on the rent payable, or the mode by which the rent is to be determined. If there is no agreement on the rent to be paid, or how it is to be arrived at, there is no concluded contract⁵.

1. This was also the position under the Statute of Frauds, 1677, which was in force in Ghana as a statute of general application prior to the coming into force of the Conveyancing Decree, 1973.

2. [1962] 1 G.L.R.277.

3. The then law was the Statute of Frauds, 1677, S. 4.

4. Conveyancing Decree, 1973, S.2 (a).

5. Bunswell v. Goodwin [1971] 1 W.L.R. 92.

In his judgment in Short v. Morris, Adumua-Bossman J, as he then was, said¹:

"In my opinion the memorandum does not evidence a concluded agreement to sell even at a price to be ascertained. It states clearly and unequivocally that a price was to be agreed on, as the offer of the defendant and her brother at £1,000 had not been accepted, but on the contrary a counter offer of £850 had been made which in turn had not been accepted . . . I am satisfied therefore that there was never any concluded agreement to sell".

2. Premises to be Let.

There must be agreement on the premises to be let. In Asare v. Antwi² the plaintiff offered to buy a plot of land from the defendant who had several plots of land. The plot to be bought/sold was never identified. The plaintiff paid an advance of £50 and a receipt was issued by the defendant which stated that it was "part payment of the cost of plot . . . to be sold to him". An application for specific performance was granted by the trial judge. On appeal this decision was overruled and the order for specific performance was quashed. The Court of Appeal said:³

"From the foregoing analysis, it is apparent that the parties to this action merely entered into negotiations for the sale of an undefined plot of land which did not however mature into a binding, concluded or definite contract. The evidence does not disclose that they were 'adidem' about either the price or the subject-matter".

3. Other Terms.

There must also be agreement on when the tenancy is to commence and on the duration of the tenancy⁴.

1. (1958) 3 W.A.L.R.339 at p.341.

2. [1975] 1 G.L.R.16.

3. *ibid.*, at p.22.

4. These are discussed more fully when considering what the writing evidencing a contract must contain: *infra.*, pp.106-111.

d. Contract Must be Binding.

There is no binding contract when the writing appears only to be terms agreed on as a basis for a contract and not the contract itself. Nor is there a binding contract where the agreement is expressed to be "subject to the preparation and approval of a formal contract" or just "subject to contract".

The principle which governs these cases was stated thus by Parker J:¹

"It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is the mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored".

In more recent times, the words "subject to formal contract" or "subject to contract" render unenforceable any contract into which they are introduced, unless there are some very exceptional circumstances necessitating a different construction². . .

It is clear, however, that the mere fact that the parties have expressly stated that a formal contract is to be drawn does not imply that they continue merely in negotiation³. As ^{was} pointed out in Scamell v. Ouston⁴;

1. Von Hatzfield-Wildenburg v. Alexander [1912] 1 Ch.284.

2. Chillingworth v. Esche [1924] 1 Ch.97.; Griffiths v. Young [1970] 1 All.E.R.601.; Law v. Jones 1974 Ch.112.

3. Rossiter v. Miller (1818) 3 App.Cas.1124, 1151.; Brama v. Cabarro [1947] K.B.854.

4. [1941] 1 All.E.R.14., at P.24, per Lord Wright.

"The court will do its best if satisfied that there was an ascertainable and determinate intention to contract, to give effect to that intention looking at substance and not mere form".

This was what happened in Nunoo v. Nyimfa¹. In this case the plaintiff sought specific performance of an agreement to execute a lease. The agreement contained the clause "lease as finally drafted to be approved by the parties". The agreement was reached in an out of court settlement in a case in which there was a dispute as to the proper authority to grant a tenancy. The terms of the lease were not in dispute. It was argued for the defendants that the clause was analogous to the "subject to contract" clauses common in agreements for a lease and that until a lease was produced and approved, it effectively prevented any enforceable contract from coming into existence. It was held that although the agreement between the parties contemplated the preparation and execution of a formal lease, it was intended by the parties to be enforceable. After a review of some of the English cases, Adumua-Bossman J. continued:²

"It is to be particularly observed that, unlike the cases relied on by counsel for the defendants, the agreement does not even contemplate the drawingup, approval and signing of any formal agreement or contract, before the drawing up of the formal lease. In my construction of it, it falls within the class of complete or concluded agreements. The very background to, and circumstances surrounding the making of it, in my view, negative the suggestion that it was no more than mere negotiation to be subsequently converted into a concluded agreement only after further discussions to agree on terms . . . Those words construed by learned counsel for the defendants as introducing a new term into the agreement, would seem to have been inserted 'ex abundanti cautela' to use the words of Lord Cairns in Hussey v. Horne-Payne as:

1. (1958) 3 W.A.L.R.95.

2. *ibid.*, at pp. 99-100.

'meaning nothing more than a guard against it being supposed that the draft lease would be accepted without it being approved in the usual way'. Therein, I think, lies the all-decisive, real and vital difference between our particular case and those cited and relied on by counsel for the defendant".

It may be pointed out that in Von Hatzfield-Wildenburg v. Alexander Parker J. said that the courts will not enforce a contract to contract. This is not a correct statement of the law. A contract to enter into a contract to create a tenancy is a valid and enforceable contract.³

e. What the writing must contain.

In Djan v. Owoo⁴ the law was stated by Edusei J. He said:

" There cannot, in my view, be a completed contract in terms of section 2(a) of N.R.C.D.I75, unless the contract in writing gives (i) the names of the parties, (ii) the property to be transferred, (iii) the purchase price of the property and lastly (iv) the defendant must have signed the written contract. It is important that there must be written evidence of at least these matters"⁵

1. Rent

The rent agreed to must be evidenced in writing. In Djan v. Owoo the parties orally agreed to buy/sell a house. The uuyer made two advance payments towards the purchase price For this he was issued with receipts which though satisfying the test laid down by Edusei J. in every other respect did not state the agreed purchase price. It was therefore held that there was not

1. op. cit.

2. It was criticised by Sargant L.J. in Chillingworth v. Esche op. cit., at pp. II3-II4.

3. Foster v. Wheeler (1888) 38 Ch.D.I30.

4. [1976] 2 G.L.R.401.

5. ibid. ,403.

a sufficient note or memorandum of the contract to satisfy section 2 (a) of N.R.C.D.175. *The learned judge said;*

" . . . there is no mention of the purchase price in the payment made by the plaintiff and there is nothing in either of the two receipts to show for how much the house was to be sold. It is true that the purchase price of £ 25,000 has been stated in the statement of claim and this is admitted by the defendant in his statement of defence but this cannot in my view be incorporated in the written ^{contract}. In short the purchase price is not stated in the written contract".

This decision has been criticised by Kludze². He argues that Djan v. Owoo interpreted the requirement of writing rather mechanically. In Kludze's view the rationale underlying section 2 (a) of the Conveyancing Decree, 1973, (and its predecessor, section 4 of the Statute of Frauds, 1677) was the elimination of fraud and perjury by insisting on written records of contract. But the legislation must not be used as an engine of fraud and therefore, since the parties had in their pleadings accepted that they had agreed on the purchase price, the contract should have been enforced. We agree with Kludze that on the facts of Djan v. Owoo, the learned judge was in error. The Decree does not stipulate that the writing evidencing the contract must be in a single document. Therefore, since the agreed purchase price was evidenced by the written statements of the parties, the contract should have been enforced³

This should not mean that a contract should be enforceable if part of it only is evidenced in writing—for this would lead to disputes as to what the terms of a contract are; the disease which the Decree sought to cure.

1. Djan v. Owoo, supra, at p.403.

2. Kludze, A.K.P., "Developments In Specific Performance", (1977) 9 R.G.L.103, 112-113.

3. In English law, however, the position is that the written contract or memorandum thereof must have existed before the action based on it commenced.

2. The duration of the tenancy and the time for commencement

The writing evidencing the contract must state the duration of the tenancy to be granted and the time from which it is to commence. This statement of the law was confirmed in Sbaiti v. Samarasinghe.¹ In this case the defendant entered into an oral agreement with the plaintiff to let him premises which were then uncompleted. The agreement was to let the premises for a five-year term at an annual rent of C 5,000. The agreement was not in writing, but a note of it was made. When the premises were completed the defendant refused to give possession to the plaintiff who then sued for specific performance. The application was not granted on this ground because the note in question did not contain the date of commencement and the duration of the tenancy.

This ruling has been criticised by Kludze.³ Firstly, Kludze considers it settled law that where the date for commencement of a tenancy is not stated it is deemed to take effect immediately. With respect, Kludze seems to be confusing two separate issues, namely:

- (i) whether the date of commencement must be stated in a memorandum evidencing a contract to create a tenancy and;
- (ii) whether a lease which does not stipulate a date for commencement is to take effect immediately?

The court was concerned with the former question, not the latter. The ruling is the correct one on the issue. Woodfall writes⁴

1. [1976] 2 G.L.R.361

2. The case was decided on the basis of the Statute of Frauds, 1677.s.4

3. Kludze, A.K.P., "Developments in specific performance" (1977) 9 R.G.L.103.

4. Woodfall, op. cit., p.141. Kludze cites Woodfall, Landlord and Tenant (27th. ed., 1968, vol. I, p.214, in support of his view. But Woodfall was there writing about the commencement of a tenancy and not what a contract to create must contain.

a tenancy is not stated, it is deemed to take effect immediately. With respect, Kludze seems to be confusing two separate issues, namely:

- (I) whether the date of commencement must be stated in a writing evidencing a contract to create a tenancy and;
- (II) whether a lease which does not stipulate a date for commencement is to take effect immediately?

The learned judge was concerned with the first question and not the second. His statement of the law, as far as the first question is concerned, is the correct statement of the law. Woodfall states the law thus:¹

1. Woodfall, op.cit., p.141. Kludze cites Woodfall, Landlord and Tenant, (27th ed. 1968), Vol.I, p.214, in support of his view; but Woodfall was there writing about the commencement of a tenancy and not what a contract to create a tenancy must contain.

"Where no date is mentioned, there is no inference that the term is to commence from the date of the agreement in the absence of language pointing to that conclusion, nor that it is to commence 'within a reasonable time'".

That Kludze considered the latter question is shown from the fact that he cites Doe d. Phillip v. Benjamin¹, where the words "agrees to let" were construed as an immediate grant rather than as an agreement to grant a tenancy. Kludze continues:²

"It is submitted, therefore, that as the defendant had signed a note confirming the grant of the lease without stipulating a date of commencement therein, it ought to have been construed as an immediate grant in possession rather than a reversionary lease to commence from a future date".

With respect, this was not the issue before the court³. Though Kludze seems to be arguing that the note evidenced the grant of a lease, the issue that the court dealt with was that the note was a memorandum of a contract for a lease.

Kludze further argues that the learned judge erred in holding that the contract was unenforceable because the note did not contain the duration of the tenancy. Kludze's view is that since the note expressly stated that the lease was "at a rental of £ 5,000 per annum" a yearly tenancy is presumed by law. Says Kludze⁴:

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1. (1839) 9 A. & E.644. Kludze does not, however, refer to cases like, Marshall v. Berridge (1881) 19 Ch.D.233 and Edward v. Jones (1921) 124 L.T.740, both of which support the position of Lamptey Ag. J., and state the law with regards to contracts for a lease.
 2. Kludze A.K.P., supra, p.109, (emphases supplied).
 3. It could not have been argued that the note constituted a lease. This is because by section 1 (1) of N.R.C.D.175 a lease must be in writing. The note in this case was not the conveyance - the agreement was entered into orally and the note was just evidence of the oral agreement. Indeed under the law prior to the Conveyancing Decree, which was the law by which the judge, albeit wrongly, decided the case, a tenancy for five years must be by deed.
 4. Kludze A.K.P., "Developments in specific performance", op.cit., p.109.

"It is respectfully submitted that in the absence of a stipulated duration of a lease, if rent is measured by the year, a yearly tenancy is presumed in law. As in the instant case the rent was reserved by reference to the year, it was a yearly tenancy and it is respectfully submitted that the learned trial judge could have so held".

Again Kludze is confusing the two separate and different issues already identified¹. The learned trial judge's statement of the law is the correct one². The parties orally agreed to a five - year term and though it is a correct statement of the law that when the grantee enters into possession and proceeds to pay rent measured by the year, a yearly tenancy is implied, it is not the law that when the grantee applies for a decree of specific performance of the oral agreement, on the ground that there is a sufficient memorandum of it, the court should imply a yearly tenancy because the note stipulates that a rental of ₦ 5,000 per annum was to be paid³.

Other Terms

The writing must also contain; (1) the name of the parties, (II) a description of the premises to be let and (III) must be signed by the parties.

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1. He cites Megarry & Wade, The Law of Real Property, 1966, p.640 in support of his position. But Megarry & Wade does not support Kludze; the learned authors said that a yearly tenancy is presumed if a person occupies land under a void lease and rent, measured with reference to a year, is paid and accepted.
 2. Bayley v. Fitzmaurice (1860) 8 E & B 604; Clarke v. Fuller (1864) 16 C.B.(N.S.) 24; Dolling v. Evans (1867) 36 L.J. Ch.474.
 3. In the present case there is no evidence whatsoever that rent, measured with reference to a year, was paid and accepted.

VI. Specific Performance

Specific performance is an order of a court directed at a particular person to compel the discharge of an obligation. A pre-requisite for the grant of an order of specific performance is that there must be a complete and binding lawful contract or lease. It is not intended to discuss all the established English-law rules for the grant of specific performance,¹ nor is it intended to examine in detail the re-examination of some of these rules occurring in both systems.² Discussion will be aimed at establishing the nature of the new developments taking place and to areas where re-examination of the English-law rules is considered necessary.

a. Part performance

By section 3(2) of the Conveyancing Decree, 1973, the requirement that a lease must be in writing and that a contract for a tenancy must be evidenced in writing:

" shall be subject to the rules relating to.....
part performance ".

An oral contract for a tenancy or oral lease, if supported by a sufficient act of part performance, is specifically enforceable. The basis for specific performance in this instance is that one party having altered his position on the basis of the promise of the other party, it would amount to fraud if the other party is allowed to renege on his promise. The proposition is thus expressed in

Chitty on Contracts:

- I. Interested readers may consult Hanbury, H.G., Modern Equity, London, 1976; Snell, Principles of equity, London, 1973; Fry, Specific Performance, London, 1921.
2. See Djan v. Owoo [1976] 2 G.L.R. 401; Lartey v. Bannerman [1976] 2 G.L.R. 461; Steadman v. Steadman [1976] A.C. 536; Price v. Strange [1977] 2 W.L.R. 943; Kludze, A.K.P., "Developments in specific performance", (1977) 9 R.G.L. 102; Woodman, G.R., "Parallel development in specific performance", (1978) 10 R.G.L. 185.

" Where the plaintiff has partly performed an oral contract required by statute to be evidenced in writing, in the expectation that the defendant would perform the rest of the contract, the court will not allow the defendant to escape from his contract upon the strength of the statute, but will order specific performance of the oral contract".¹

An oral contract to create a tenancy supported by a sufficient act of part performance was held to be specifically enforceable in Sackey v. Ashong². In this case, the plaintiff offered to grant tenancy of a house to the defendant. The offer was made in a letter which stipulated the rent payable, the date of commencement and the minimum duration of the tenancy, a description of the subject-matter and "usual covenants". It was a condition for the grant of a tenancy that the defendant carried out some repairs to the property. he defendant, who was already in possession due to his connection with the previous tenant, undertook substantial repairs to the property. Furthermore from the date of the commencement of the tenancy, the proposed rent was either received by or credited to the plaintiff. In an action for recovery of possession, it was held by the West African Court Of Appeal that the execution of repairs coupled with possession constituted a sufficient act of part performance which excused the need for writing. Delivering the judgment of the court, Coussey P. said:

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1. Chitty, Chitty on Contracts, London, 1968, vol. I, p. 90, para. 181.
 2. (1956) 1 W.A.L.R. 108.

" There were acts of part performance, referable only to the agreement. on the plaitiff's part in letting the defendant into possession and on the defendant's part in doing repairs and paying rent as from January 1, 1951. In these circumstances the plaintiff cannot run away with the benefits to her done by the defendant. Equity looks upon that as done which ought to be done, for here on a promise for a lease the defendant had laid out his money on repairs to the extent stated already. He cannot be treated as a trespasser".¹

The act of part performance, asCoussey P. pointed out, must be unequivocally referable to the contract alleged.² Continued possession coupled with special expenditure by the tenant is a sufficient act of part performance.³ But mere continuance in possession would not be enough - it is an equivocal act.⁴ The expenditure of money, on repairs, by a proposed tenant is a sufficient act of part performance. The payment of an increased rent by a tenant, who continues in possession, may be sufficient. But the traditional English-law position had been that advancement payment of rent is not a sufficient act of part performance.⁵ This traditional English-law position is now being re-examined both in Ghana⁶ and in England.⁷ These developments indicate that advance payment of rent

1. op. cit., at II5.

2. See also Fry, op. cit., s.582; Kingswood Estate Co. v. Anderson 1963 2Q.B.169; Steadman v. Steadman [1976] A.C.536.

3. Sackey v. Ashong, op.cit.

4. Re National Savings Bank Ex parte Brady (1867) 1 W.R.536.

5. Madison v. Alderson (1883) 8 App. Cas. 467; Thursby v. Eccles (1900) L.J.(Q.B.)91; Chaproniere v. Lambert [1917] 2 Ch.536.

6. See Djan v. Owoo [1976] 2 G.L.R.401; Kludze, A.K.P., "Developments in Specific Performance", (1977) 9 R.G.L.102.

7. See Steadman v. Steadman, *ibid.*; Woodman, G.R., "Parallel development in specific performance", op.cit. 185-186.

if established to be unequivocally referable to the contract (as, for a example, by the evidence of a receipt) would be a sufficient act of part performance.

b. Mutuality

It used to be supposed that specific performance would not be granted if the remedy is not available to the other party, i.e., if there is a want of mutuality.¹ But (in addition to the academic writers who have challenged this view of the law for some time²), the courts both ⁱⁿ Ghana³ and ⁱⁿ England⁴ are re-examining the position on mutuality.

It is suggested that this re-examination is long overdue. The absence of mutuality should not by itself prevent the grant of specific performance. The courts have been empowered by section 18 of the Conveyancing Decree, 1973, to set aside a conveyance or a contract to transfer an interest in immovable property if it is satisfied (on the basis of all the evidence) that it would be unconscionable to enforce the contract or conveyance . This provision may be used in cases where it is thought that an injustice will be done if a particular contract is specifically enforced. this principle may be extended to other types of contract.

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1. Flight v. Bolland (1828) 4 Russell 298; Fry, Specific Performance, London, 1921, p. 219.
 2. See Ames, J.B., Lectures in Legal History, Cambridge, Massachusetts, 1913, p. 370; Maitland, F.W., Lectures on Equity, Cambridge, 1936, p. 311.
 3. See Lartey v. Bannerman [1976] 2 G.L.R. 461; Kludze, A.K.P., "Developments in specific performance", (1977) 9 R.G.L. 102.
 4. See Price v. Strange [1977] 2 W.L.R. 943; Woodman, G.R., "Parallel development in specific performance", *op. cit.*, 186-187.

c. Destruction of the Property¹.

The common-law rule is that the accidental destruction of premises, the subject - matter of a lease or a contract to create a tenancy - after the contract or lease has been concluded but before the tenant goes into possession - affords no defence to an action for specific performance². The reason given for this rule is that the intended tenant, under a contract to create a tenancy, is in equity regarded as being a tenant and since he would be entitled to any benefits from the tenancy, he should have the burden of any loss. The tenant was deemed to have an interest in the land despite the fact that the premises have been destroyed. He would be obligated to pay rent notwithstanding destruction for which he is not responsible. Equity did not intervene³.

This rule hardly seems justifiable today. It may have been justified in feudal England when conveyances were mainly concerned with land and what structures there were mainly incidental and not quite valuable. It is wholly inappropriate when dealing with residential tenancies in modern urban conditions. To quote Friedman:⁴

"The common law rule may not have been inappropriate at the time and in the circumstances it was developed - an agricultural lease in which the improvements were merely incidental. Damage to the house, or its destruction, might make life inconvenient but the land was still still tillable".

This common law rule shows one area where the rules governing the residential tenancy relationship differ from the ordinary principles of contract law. Under normal principle of contract law, if a contract becomes incapable

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1. The related question of destruction or damage to premises during the existence of a tenancy, is discussed below at pp.210-211, 221-222 and 239-242.
 2. Paine v. Mellor (1801) 6 Ves.349; Counter v. Macpherson (1845) 5 Moore P.C.83.
 3. Leeds v. Cheetham 1 Sim 146, 57 E.R.533.
 4. Friedman on Leases, Vol.1, New York, 1974, p307.

of performance because of unforeseen circumstances, both parties are relieved from their obligations under the contract. In Taylor v. Caldwell¹, the plaintiff agreed to let out a music hall for four days for the express purpose of it being used for giving concerts and fetes. The music hall was burnt down before the time of hire. It was held that the plaintiff was not entitled to damages because the contract has been frustrated—and that both parties should be relieved from their obligations.

Woodfall has sought to distinguish Taylor v. Caldwell and similar contract law cases² which establish the doctrine of frustration, on the ground *cases the existence of the subject-matter was an* that in these, implied condition of the contract and that its continued existence was the foundation for fulfilling the other obligations of the contract³.

With respect the distinction hardly seems existent; for surely the existence of premises must be a pre-condition for a residential tenancy. There is no logical reason for the distinction and we would recommend that where premises, the subject—matter of a contract to create a tenancy or a lease, is destroyed before the tenant can take possession, the contract should be treated as having been frustrated—and the parties should be relieved of their obligations⁴.

1. (1863) 3 B & S 826.

2. Krell v. Henry [1903] 2 K.B.740.

3. Law of Landlord and Tenant, London, (1978), 28th ed., Vol.1, p.165.

4. In Rom Securities Ltd., v. Rogers (Holdings) Ltd., Goff J. had no doubt that the doctrine of frustration could apply to a contract to create a tenancy, at least before entry into possession.

d. Equitable tenancies

An order for specific performance of a contract to create a tenancy will be complied with by the execution of a lease (irrespective of any rights an occupier may have acquired as a tenant at will or a periodic tenant). The courts (exercising their equitable jurisdiction) enforce the terms of the intended tenancy if the contract is specifically enforceable. But since "equity looks on as done that which ought to be done", the effect of a specifically enforceable contract is to immediately create an equitable interest in the property enuring to the benefit of the grantee¹. Hence the expression 'equitable leases'. The equitable tenant would be held to hold under the same terms as if the lease had been actually granted.

Since equitable rules prevail over rules of law in cases of conflict, it has been established as a general proposition of law (since Walsh v. Lonsdale²) that a contract for a lease is as good as a lease. But there remain important differences which should not be overlooked³.

1. Dependence on specific performance

There can be an equitable lease on the terms of a contract for a lease only if the contract is specifically enforceable. If, for any reason (like laches, unclean hands, etc.) the court is unable or unwilling to grant specific performance the position may be very different from if a tenancy had been granted.

2. Third-parties

In legal theory there are basic differences as to third parties. A tenancy creates a legal interest, good against the whole world. An equitable lease is binding and enforceable between the parties only. It suffers the weakness of all equitable interests; it is not good against a bonafide purchaser of legal estate for value without notice⁴.

In practice the difference is not that fundamental as regards residential tenancies in urban Ghana. Tenants occupy their rented premises; the absence of notice (and this includes constructive notice) would therefore be difficult to establish.

1. Walsh v. Lonsdale (1882) 2 1 Ch. D.9; Palmer v. Carey [1926] A.C.703 (F.N.2,3,4, p.t.o.)

3. Assignment

A legal tenancy gives the tenant a legal interest and an assignment passes both the rights and obligations of the tenant under Covenants relating to the property¹. A contract to create a tenancy creates only rights in personam. It is thus governed by the ordinary rule that the benefit but not the burden of a contract is assignable². Only the benefits of Covenants and rights under the contract (including the right to claim specific performance) are assignable; but not the burdens. So, while the assignee can sue the landlord to enforce any of his rights under the contract, the landlord can only sue the assignor (in case of breach of the tenant's obligations) but not the assignee³, even though the assignee has taken possession.

1. Conveyancing Decree, 1973 (N.R.C.D.175) ss.27 & 23.

2. See Re Pain [1919] 1 Ch.38; Snell, Principles of Equity, op.cit., p.72.

3. See Purchase v. Lichfield Brewery Co. [1915] 1 K.B.185

2. *supra*.

3. See Manchester Brewery Co., v. Coombs [1901] 2 Ch.608, 617.

4. Since by the Land Registry Act, 1962, s 25 (1) registration of a contract serves as actual notice to the whole world, a registered contract for a lease (or memorandum of such a contract) does not suffer from this frailty. Oral grants and contracts supported by acts of part performance, however, continue to suffer from this weakness.

V. Registration of Instruments affecting residential property

Introduction

A system of registration is primarily aimed at introducing a measure of certainty into a system of landholding.¹ The amount of certainty actually offered depends on a number of factors including the type of registration system, i.e., whether it is a title registration or an instruments' registration system.²

There is no system for the registration of title in Ghana. What exists is an instruments' registration system.³ The register contains evidence of the title-situation (various instruments affecting a piece of property) and not judicial or administrative determination of title. Registration of an instrument under this system does not confer a state-guaranteed title.⁴

The system for the registration of instruments affecting residential property is governed by the Land Registry Act, 1962 (Act 112).

I. What is registrable.

The Land Registry Act, 1962 (Act 112) provides for the registration of any "instrument".⁵ The interpretation section of the Act defines an instrument as "any writing affecting land".⁶ The definition would cover a deed of conveyance and, as Woodman has pointed out, the

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1. For a discussion of the purposes of registration, see Simpson, S.R., Land Law and Registration, Cambridge, 1976, pp.
 2. For a discussion of the distinction between a title registration system and an instruments' registration system, see Simpson, S.R., op. cit., pp. 19-23; also Kwofie v. Kakraba [1966] G.L.R. 229.
 3. Act 112, s. 3; Kwofie v. Kakraba [1966] G.L.R. 229, per Archer J. at 231-232.
 4. Ntem v. Ankwandah [1977] 2 G.L.R. 452, per Apaloo C.J. at 459; Kwofie v. Kakraba, op. cit., 231-232.
 5. Act 112, s. 3.
 6. *ibid.*, s. 36.

term is sufficiently wide to cover contracts to create tenancies or memoranda evidencing contracts to create tenancies.¹ But does it cover such things as letters exchanged between parties who have contracted to create a tenancy or receipts given for rent paid?² The courts have given a wide construction to the term. In Adu-Sarkodie v. Karam³ the plaintiff bought a house. The defendants claimed that the house was subject to a lease in their favour for ten years. The lease upon which the defendants relied, was never reduced into a formal written conveyance. But there were tendered in evidence letters signed by the defendant and the plaintiff's vendor, which embodied the essential terms of the tenancy. The letters had not been registered. It was held by Aboagye J., that no valid tenancy existed because the instruments evidencing the contract had not been registered. In the view of the learned judge, the letters were registrable and failure to register was fatal⁴.

The decision in Adu - Sarkodie has been criticised by Kludze⁵. He argues that such a wide construction works injustice between the parties; and that since the intention of the parties is clear from the letters exchanged, failure to register should not be fatal. Kludze argues that this should particularly be so as most people do not realise that even letters affecting property ought to be registered. He further argues that ^{from a} purely practical standpoint a letter should not be held to be registrable. This is because, under section 4 of Act 122, an instrument should contain sufficient particulars on the location and description of the property it affects. In fact, section 4 envisages

1. Woodman, G.R., "The registration of instruments affecting land", (1975) 7 R.G.L. 46.

2. See criticism of the expression "writing affecting land" in Bentsi-Enchill, Ghana Land Law, op.cit, p.329. This is a very serious issue because if these facts are registrable, failure to register would result in invalidity.

3. [1975] 1 G.L.R.411.

4. See also, Sbaiti v. Samarasinghe [1976] 2 G.L.R.361.

5. Kludze A.K.P., "The Equitable Tenant and Protection Against Eviction", (1976) 8 R.G.L.63, at pp.65-66.

the drawing up of a cadastral plan in appropriate circumstances¹. Kludze, therefore, argues that it will be difficult to register correspondence exchanged between parties who have negotiated the grant of a tenancy since such correspondence might not contain the particulars required by law. He concludes:²

"In effect, it is submitted, with respect, that it is an impracticable proposition to say that letters affecting land must be registered to confer an interest in land".

There is an important policy consideration justifying the decision in Adu - Sarkodie and similar cases³, which Kludze seems to have overlooked. This is deterrence⁴. If there is a considerable number of transactions not registered, because letters and receipts given for money paid are non-registrable, a system of registration becomes largely emasculated*. Every unregistered instrument contributes to this development; for the greater the number of transactions which are not registered, the less effective and reliable the register. It therefore makes good sense to apply the strongest possible pressures to ensure that as many transactions as possible are registered. One way of doing this is to interpret as widely as possible the expression, "any writing affecting land". If it becomes clear that the courts will insist that even letters and receipts given for money paid must—to be effective—be registered, then parties will make sure that the property is described with sufficient particularity to satisfy the registrar. Indeed Kludze himself says that:⁵

"If, for purposes of registering letters between parties, they would have to get a cadastral plan prepared for them, they might accompany it with the less expensive

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1. The registrar is empowered under section 4, to refuse any instrument which, he considers, does not describe the property with sufficient particularity.
 2. Kludze, A.K.P., "The equitable tenant and protection against eviction", op.cit., 66
 3. Sbaiti v. Samarasinghe, supra.
 4. This point is made by Woodman, G.R., in another context: See, "Giving Teeth to the Land Registry Act", (1972) 4 R.G.L.231.
 5. "The equitable tenant and protection against eviction", op.cit., p.66.
 - *. See Woodman, G.R., "Giving Teeth to the Land Registry Act", op.cit., p.240.

preparation of a formal lease".

This result would be so much the better for a system of registration.

2. The mode of registration

The original instrument and a duplicate must be presented to the registrar. The authenticity of the instrument and proof of it having been executed by the grantor is to be established by the oath of one of the parties or a witness.² Where a map or plan is comprised in or annexed to an instrument, a true copy of the map or plan must accompany the instrument to be registered.³ The registrar has a discretion to refuse an instrument if any alteration was not signed or initialled by the executing parties.⁴

When all the conditions have been satisfied, the registrar is required to endorse both the original and the duplicate with a certificate of registration.⁵ The duplicate is filed at the registry and the original returned to those who presented it.⁶ The registrar is to keep a register in which, upon the registration of any instrument, he is to enter the particulars on the instruments. He is also required a list of published instruments in the Gazette.⁷

1. Act 122, s.12.

2. *ibid.*, ss.5 and 6. By s.7, a judge's certificate or probate is taken as duly executed without further proof.

3. Act 122, s.16.

4. *ibid.*, s.20(d).

5. *ibid.*, s.10.

6. *ibid.*, s.12.

7. *ibid.*, s.18.

3. Consequences of registration

a. The effect of non-registration.

Act I22 provides that an instrument, other than a will or judge's certificate, "shall be of no effect until registered"¹.

This provision has been interpreted in a number of cases starting with Asare v. Brobbey¹. In this case a mortgagor sued to recover the mortgaged property, which had been sold under a power of sale conferred by the mortgaged deed. The mortgage deed had not been registered. It was held that the mortgage was invalid and the deed could not therefore confer a power of sale. The Court of Appeal explained that non-registration did not render an instrument void, because it could always be validated by registration. But it would be "invalid" and "ineffective" until registered.

The significance of Asare v. Brobbey is that it held that an unregistered instrument was "invalid" and hence unenforceable notwithstanding that the mortgagor had actual notice of its existence.³ The decision in Asare v. Brobbey has been followed in Adu-Sarkodie v. Karam⁴ and Sbaiti v. Samarasinghe⁵. In these cases non-registration of correspondence about a negotiated lease and a note confirming a contract to create a tenancy was held to render the instruments invalid. In the latter case the dispute was between the original parties. The decision in Asare v. Brobbey was further endorsed by the Court of Appeal in Ussher v. Darko⁶. In this case a purported sale was by an unregistered deed of conveyance. It was held that since

1. Act I22, s.24.

2. [1971] 2 G.L.R.331.

3. See Woodman, G.R., "The registration of instruments affecting land", (1975) 7 R.G.L.46, esp. 56.

4. [1975] 1 G.L.R.411.

5. [1976] 2 G.L.R.361.

6. [1977] 1 G.L.R.476.

the conveyance was unregistered it sinned against section 24 (1) of the Land Registry Act, and was thus 'invalid'.

The Court of Appeal, however, continued that the decision in Asare v. Brobbey implies that where there is nothing intrinsically invalid about an instrument, section 24 (1) does no more than deny it legal efficacy until it has been registered. This means that a party can perfect his title by the formality of registration at any time; unless a conflicting instrument affecting the same property has meanwhile been registered.

b. The Effect of Registration as Notice.

Act 122 provides that:

- "S 25 (1) The registration of any instrument shall be deemed to constitute actual notice of the instrument and of the fact of registration to all persons and for all purposes, as from the date of registration, unless otherwise provided in any enactment
- (2) This section does not apply to judge's certificate or a probate.

c. Oral Grants

The Land Registry Act, 1962, governs only instruments affecting property. Therefore, the priority and effectiveness of oral grants of tenancies - like tenancies taking effect in possession, for less than three years and oral contracts to create a tenancy supported by part performance - are unaffected.

CHAPTER FOUR

THE RIGHTS AND OBLIGATIONS OF LANDLORDS AND TENANTSA. COVENANTS GENERALLY

Once the residential tenancy is created, the rights and obligations of the landlord and the tenant inter se are governed by the express terms of the tenancy agreement and terms implied by law.

A well-drawn lease recites the rights and obligations expressly agreed upon by the parties. But in Ghana most tenancy arrangements are entered into orally and informally—with little more than rent and the period of payment agreed upon. Even where there is documentary evidence of some sort, this is not very helpful since most tenancies are entered into without legal advice¹. It is for these reasons that the Conveyancing Decree, 1973 (N.R.C.D.175) implies a number of terms in all residential tenancies².

The stipulations in a tenancy agreement are known as 'covenants'. A covenant, strictly speaking, is a contract made by deed. At the present time, however, the rights and obligations of any tenancy—formal or informal—are loosely referred to as covenants.⁴

d. Express or implied covenants

A covenant is either express or implied. An express covenant is one which is spelt out in the tenancy agreement. An implied covenant, on the other hand, is one which is implied either by virtue of the creation of the residential tenancy, or by statute, or by virtue of what the courts consider to be the intention of the parties.⁵

In English law the existence of an express covenant excludes the operation of the implied covenant dealing with the same matter³.

1. In the survey of 2,000 residential tenancies carried out by the present writer, 1658 (about 80%) were entered into orally and informally; 219 (over 10%) had written documents of sorts drawn up by the parties or 'letter-writers'; and only 133 (about 7%) were properly-drawn and executed leases.

2. ss.22-28.

3. Malzy v. Eicholtz [1916] 2 K.B.208; Miller v. Emcer Products [1956] Ch.304. This is the law on covenants implied by the common law. The Conveyancing Decree, 1973, ss.22 (7) and 23 (5) ^{stipulates} that though the covenants the Decree implies may be varied or extended, the covenantor cannot oust his personal liability. Any such ouster is void.

4. See Woodfall, W., Law of Landlord and Tenant, op. cit., pp. 429-30.

5. *ibid.*

Though a covenant may be implied in a tenancy by a court, this is not to be done unnecessarily. This is made clear by the Full Bench of the Court of Appeal in Thome v. Barclays Bank Co.Ltd.,¹. In this case, the landlord demised to the tenant premises which comprised two parts—a part for the business of banking and a residential part. The tenant covenanted; "to keep the interior of the said premises and the doors, windows, fittings and landlord's fixtures in good and tenantable repair and condition". The tenant undertook massive alteration to the premises and converted the residential part of the premises into offices. The landlord sued to enforce his right of re-entry for breach of the covenant to repair. This was granted by the High Court. But the ordinary bench of the Court of Appeal held that the trial judge was wrong because a covenant giving the tenant a right to undertake the alteration ought to be implied in the lease. Jiagge J.A., implied a term; "reasonably to alter and adapt" from the tenant's right to assign and sub-let. She concluded:

"The appellants, in my opinion, are free, to make the alterations complained of as a right, in exactly the same way, as if the power to do so has been expressly granted by the lease"².

Archer J.A., thought that a covenant was implied giving the tenant the right to alter the premises: firstly from the tenant's right to assign and sub-let³; and secondly, from the length of the lease and the nature of the tenant's business as bankers⁴.

On an application to the Full Bench, the implication of any such covenant (entitling the tenant to alter the premises) was rejected⁵. The Full Bench in a well - considered, unanimous judgment delivered by Azu - Crabbe, C.J., laid down the following statement of principle as a guide to whether a term ought to be implied in a tenancy agreement.

1. [1976] 2 G.L.R.126.

2. Barclays Bank Co.Ltd., v. Thome [1973] 2 G.L.R.137, 147.

3. *ibid.*, at 148-149.

4. *supra*, at 149.

5. [1976] 2 G.L.R.126, 133-138.

" . . . the first thing to consider is the express words the parties have used. Secondly a term they have not expressed is not to be implied merely because the court thinks it is a reasonable term, but only if the court thinks it is necessarily implied in the nature of the contract the parties have made"¹.

In the present case, the Full Bench held that the implication of a term entitling the tenant to alter the premises not having been shown to be demonstrably necessary, could not be said to have been intended by the parties. It would also be inconsistent with the express covenant to repair.

II. Covenants and conditions

A covenant governs the rights and obligations of the parties during the tenancy. A condition, on the other hand, is a qualification of the interest granted—the tenancy not being created until any condition precedent is satisfied or, more commonly, terminable on the occurrence of a condition subsequent.

Whether a term is a covenant or a condition is a question of construction. It is dependent on the intention of the parties. This is to be gathered from the words the parties have used and the context in which they occur³. Being

^a "the meaning of those words in all cases and for all times"⁴. Relying on certain forms of words are not necessarily to be taken as establishing the meaning of those words in all cases and for all times⁴. In every case the intention of the parties has to be ascertained by an examination of the whole transaction⁵.

III. Enforceability of covenants

a. Liability of covenantor

At common law liability between the original parties is based upon both the privity of contract and privity of estate. Consequently assignment of the tenancy though destroying the privity of estate between the parties does not affect the contractual obligations of the tenant.

1. [1976] 2 G.L.R.126, 137.

2. *ibid.*, 136-137.

3. See Woodfall, *The Law of Landlord and Tenant*, *op.cit.*, 431-440.

4. See *Westacott v. Hahn* [1918] K.B.495, per Pickford L.J. at 505, and *Scrutton L.J.* at 511; *Holiday Fellowship v. Hereford* [1959] 1 W.L.R. 211.

5. *ibid.*

A similar result ensues if the landlord assigns the reversion.¹

The assignee, on the other hand, is obliged only because of privity of estate and is liable only on those covenants which "relate to an interest in land"². Unless a covenant is one which "relates to an interest in land" it cannot benefit or be a burden on an assignee simply by virtue of privity of estate. In other words, a covenant which does not relate to the land cannot run with the tenancy or the reversion³.

b. Covenants relating to the tenancy

Any covenant which affects the landlord qua landlord or the tenant in his capacity as tenant will probably be within the class of covenants relating to the tenancy. All the covenants implied by the Conveyancing Decree, 1973, relate to the tenancy and run with the tenancy or reversion⁴.

The following covenants are stipulated by the Conveyancing Decree as relating to the tenancy⁵.

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1. See Woodfall, W., Law of Landlord and Tenant, *op. cit.*, p. 441.
 2. This is the phrase used by the Conveyancing Decree: See ss. 25-28. The phrase, it is submitted, has the same meaning as the phrase "having reference to the subject-matter" used by the English Law of Property Act, 1925, and the common-law phrase "touch and concern the land".
 3. Conveyancing Decree, 1973, ss. 25-28. The English-law rules on this subject are very technical, and often practically unworkable. It is not clear how functional the provisions of the Conveyancing Decree, 1973, would be. At the time of writing, the Decree has been in force for six years. As yet there is not a single reported case in which these rules have been applied. This is evidence, albeit inconclusive, of the irrelevance of those provisions and the judicial process to many landlords and tenants. It is also evidence of the "legal culture" which now prevails in Ghana: See *infra*, Chapter 9.
 4. S. 24.
 5. *ibid.*

1. Covenants by the tenant¹

To pay rent

Not to assign, sub-let or part with possession without landlords consent

To permit repair to adjoining premises

Not to make alterations or additions without landlord's consent

Covenant against illegal or immoral user

Covenant against nuisance or annoyance

I. Additional covenants by sub-tenants

Future observance of the head - lease

Permit repair under the head - lease

II. Additional covenants by assignees

Payment of rent

Future observance of the head - lease

Indemnity to the assignor

2. Covenants by landlord²

The right to convey

Quiet enjoyment

Freedom from encumbrances

Further assurance

I. Additional covenant by assignors and sub-lessors

Validity and past observance of the head - lease

II. Additional covenants by sub-lessors

Future observance of the head - lease

Production of title-deed and delivery of copies

The following additional covenants have been held to relate to the tenancy in the common law³.

1. Covenants by tenants

To repair⁴.

To insure against fire⁵.

To use for residential purposes only⁶.

2. Covenants by landlord

To renew the tenancy⁷.

Not to determine a periodic tenancy within the first three years⁸.

1. S.23.

2. S.22.

3. The Ghanaian courts will probably hold that such covenants relate to the tenancy.

4. Williams v. Earle (1868) L.R.3 Q.B.739.

5. Vernon v. Smith (1821) 5 B. & Ald.1.

6. Wilkinson v. Rogers (1864) 2 De.J. & S.62.

7. Weg Motors, Ltd., v. Hales [1960] 3 All E.R.181.

8. Beams Property Investment Co.Ltd., v. Stroulger [1948] 2 K.B.1.

Personal or collateral covenants, on the other hand, do not relate to the tenancy since they have no direct reference to the tenancy. Covenants relating to a matter not normally relevant to the landlord and tenant relationship do not run with the land.

c. Benefit of covenants relating to the premises

If the covenant relates to the tenancy, section 25 (1) of the Conveyancing Decree, 1973 provides that the benefit of such a covenant can be enjoyed and enforced by the covenantee and his successors in title and all those deriving title through him.

Restrictive covenants relating to the tenancy (such as a covenant that the premises shall be used for residential purposes only) shall be enjoyed and enforced by the owners and occupiers of the premises at anytime.

The Decree also provides that for the benefit of such a covenant to run with the tenancy no special expression need be used, if the benefit of such a covenant would run with the tenancy prior to the commencement of the Decree².

If a covenant which runs with the premises is breached, the tenant and an assignee entitled to the premises at the time of the breach are each liable to be sued by the landlord or any person claiming through him. But the primary liability is that of the assignee. If the original tenant is sued, he is indemnified by the assignee "against all proceedings, costs, claims and expenses"³.

d. Burden of covenants relating to the premises

By section 26 (1) of the Conveyancing Decree, 1973, the burden of a covenant relating to the premises shall, unless a contrary intention is expressed, be binding on and enforceable against the covenantor, his successors in title⁴ and all persons deriving title through or under him. This extends to a covenant entered into when the premises was not in existence⁵.

1. S.25 (2).

2. S.25 (3).

3. S.23 (1) and 3rd. Sched., Pt.III.

4. By S.26 (3) successors in title includes the owner or occupier of the premises at any time if the covenant in question is restrictive of the use to which the premises may be put.

5. S.26 (2)

e. Benefit of covenants to run with the reversion.

Section 27 (1) provides that rent and any covenant, provision or condition, relating to the tenancy and required to be observed or performed by the tenant, shall run with the reversion.

The rent, covenant, provision or condition shall be attached to the reversionary interest; and the benefit of such rent, covenant, provision or right of re-entry shall be enjoyed by the person entitled to the income of the whole or part of the leased premises¹. Such rent, covenant, right of re-entry or provision may be enforced or taken advantage of notwithstanding that the person entitled so to do became entitled after the condition of re-entry or forfeiture has become enforceable². This does not, however, render enforceable any right of re-entry or other condition waived or released before the said person became so entitled³.

The benefit of a covenant relating to the tenancy runs with the reversion regardless of the liability of the covenantor or his estate on his death⁴.

f. Burden of covenants to run with the reversion

The obligations of the landlord having reference to the subject matter of the tenancy shall, to the extent that the landlord has power to bind the reversionary interest⁵, be attached to the reversionary interest or any part thereof notwithstanding severance of that reversionary interest⁶. The obligations—relating to the tenancy—undertaken by the landlord is binding on any person entitled to the reversionary interest at any particular point in time⁷. Such an obligation may be taken advantage of and enforced by the tenant and anybody claiming through him⁸.

Like the benefit of covenants running with the reversion, the burden of such covenants shall have effect notwithstanding any liability affecting the landlord on his death⁹.

1. S.27 (2).

7. *ibid.*

2. S.27 (3).

8. *ibid.*

3. *ibid.*

9. S.28 (2).

4. S.27 (4).

5. See *supra*.

6. S.28 (1).

B. Covenants Implied by the Conveyancing Decree, 1973

I. Implied Obligations of tenants¹.

a. Repair to Adjoining Premises.

In a tenancy for valuable consideration, the tenant impliedly covenants to permit the landlord, his agents and all necessary workmen, at all reasonable times, to enter the premises to execute repairs or alterations to any adjoining property belonging to the landlord². The right of the landlord is to be exercised at all reasonable times after the tenant had been given written notice³. The landlord is liable for all damage occasioned by such entry⁴. The benefit and burden of this covenant run with the tenancy and with the reversion⁵.

As with most of the covenants implied by the Decree, this provision has not yet been the subject of judicial interpretation by the Ghana courts. In English law, however, the word 'adjoining' has been the subject of judicial interpretation. In White v. Harrow⁶, the plaintiff, a tenant of a house sub-let it to the defendants who covenanted that he would not "object to any works to adjoining premises". The defendant brought an action to restrain the erection of buildings on neighbouring land because he alleged that this would obstruct the access of light hitherto enjoyed by his premises. In holding for the defendant, the Court of Appeal decided that the words "adjoining premises" only applied to buildings which came into physical contact with the demised premises and that though the proposed buildings were near, they were not physically adjoining.

It is not suggested that the Ghana courts will follow this English decision. In the first place, this is a matter of construction to be gathered from the circumstances of each particular cases ; and, therefore decisions which have

1. The tenant's rental obligation is considered separately in a chapter 5: See infra, pp.212-230.

2. Section 23 (1) and 3rd Schedule, Part I.

3. *ibid.*

4. *ibid.*

5. Section 24.

6. White v. Harrow (1902) 86 L.T. 4.

placed a particular meaning on a particular form of words are not to be taken as authorities for the proposition that those words must always bear the same meaning². Secondly, and perhaps more importantly, in White v. Harrow the English court was dealing with an express covenant. In Ghana, however, the covenant is statutorily implied and as a general rule express covenants are more strictly construed³.

b. Alterations and additions

The tenant further covenants that, without the previous written consent of the landlord, he will not erect any new building on the premises or make any alterations or additions to the premises⁴. Like all the implied covenants by the tenant, this covenant may be varied or extended, but the personal liability of the tenant cannot be ousted⁵. A purported ouster of personal liability would be void⁶.

An 'alteration' has been defined by Evans as:

"a change in the form and constitution of building, such as the conversion of a bedroom into a bath, the sub-division of two rooms, or the insertion of windows into walls, but not just a change in the appearance of the building"⁷.

But the Decree also forbids any 'additions' to the premises without the written consent of the landlord. It is submitted that the effect of this is to prohibit any change whatsoever to the premises. It is suggested^{ed} that this has the result of departing from the present English-law position. In English law, if there is a qualified covenant against alterations (i.e., without the consent of the landlord), section 19 (2) of the Landlord and Tenant Act, 1927

2. See, Westacott v. Hahn [1918] 1K.B.485, per Pickford L.J. at p.505 and Scrutton L.J. at p.511; Holiday Fellowship v. Hereford 1959 1 W.L.R.211.

In fact in Cave v. Horrell [1912] 3 K.B.533; Foster v. Lyons [1927] 1 Ch.219; and Spillers v. Cardiff Assessment Committee [1931] 2 K.B.21, the word 'adjoining' was given the very construction rejected in White v. Harrow, op.cit.

3. See, ShU brick v. Salmond (1765) 3 Burr.1639.

4. Conveyancing Decree, 1973, section 23 (1) and 3rd Schedule, pt I.

5. Section 23 (5)

6. ibid.

7. The Law of Landlord and Tenant, London, 1975, p.149.

further qualifies it in respect of any alteration that is an improvement, by stipulating that in such a case consent is not to be unreasonably withheld. This English-law exception is not followed in Ghana. The Conveyancing Decree forbids "any alteration or addition" to the leased premises without the consent of the landlord¹. There is no proviso that if such alteration or addition constituted an improvement then the consent of the landlord is not to be unreasonably withheld². The result is that a tenant cannot carry out improvements to the premises without the consent of the landlord; this is so even if the consent of the landlord has been unreasonably withheld.

c. Injury to walls³

The tenant impliedly covenants not to cut or injure any of the walls or timbers of the premises or to permit such cutting or injury to be done⁴.

d. Assignment and sub-letting

The tenant impliedly covenants not to assign, sub-let or part with possession of the leased premises or any part thereof without the prior written consent of the landlord⁵. The consent of the landlord is not to be unreasonably withheld in the case of "a respectable and responsible person"⁶. The covenant may be varied or extended but the personal liability of the tenant cannot be completely excluded⁷. The Decree gives no guidance on who is a respectable and responsible person in Ghanaian society. It is suggested that this is a question of fact for the trial judge.

1. Scope of the covenant

The covenant prohibits an assignment, sub-letting or parting with possession without the written consent of the landlord.

1. S.23 (1) & 3rd Sched. Pt.I.

2. In the case of the covenant against assignment and sub-letting the Decree provides that consent is not to be unreasonably withheld; by implication, it does not apply in this instance.

3. See *infra*, pp.192-193 for the common-law concept of waste.

4. S.23 (1) & 3rd Sched. Pt.I.

5. *ibid.*

6. *ibid.*

7. S.23 (5).

An "assignment" is defined in the interpretation section of the Decree as "the transfer of the residue of a term or interest created by lease"¹, a sub-lease is defined to include "an agreement for a sub-lease where the sub-lessee has become entitled to have his sub-lease granted"².

The terms of the implied covenant are sufficiently wide to cover most instances in which the tenant parts with possession of the leased premises or any part thereof³. It may however be that this form of words would not be wide enough to cover all cases of occupation by third-parties. In English law, it has been held that as long as the tenant remains in possession he may permit another to use the premises without breaching the express covenant not to assign sub-let or part with possession of demised premises⁴. This is because the English courts have taken the view that possession in this context means legal rather than physical possession. The covenant against parting with possession is therefore not breached so long as the tenant retains legal possession. Thus in a case in which the tenant allowed user of premises during certain hours to a third party, it was held that this was not in breach of a covenant not to assign, sub-let or part with possession though it will be in breach of a covenant against sharing or occupation of any part of the premises⁵. In Stening v. Abrahams the English law position was stated thus:

" . . . a lessee cannot be said to part with the possession of any part of the premises unless his agreement with his licensee wholly ousts him from legal possession"⁶

This is unsatisfactory. As has been argued this concept of "exclusive possession" or "legal possession" is an unnecessary red-herring⁷. It is thus

1. N.R.C.D.175, S.45 (1).

2. *ibid.*, S.45 (2).

3. In English law the covenants are construed strictly if they occur individually; a covenant against sub-letting will therefore not prohibit assignment.

4. Chaplin v. Smith [1926] 1 K.B.198; Lam Kee Ying Sdn.Bhd. v. Lam Shes Tang [1975] A.C.247.

5. Jackson v. Simons [1923] 1 Ch.373.

6. [1931] 1 Ch.470, per Farwell J, at p.473.

7. *Supra*, pp.70-71.

suggested that in cases where the tenant has parted with occupation or any part thereof, it should be open to the Ghanaian courts to hold that the tenant is in breach of his implied covenant¹. This is reasonable, for otherwise tenants could by granting 'licences' for valuable consideration defeat the purpose of the covenant².

2. Consent must be in writing

The Decree specifically states that the consent of the landlord must be in writing³. The writing need not be in any particular form. In English law, it has been held that a letter will suffice⁴.

3. Consent not to be unreasonably withheld

The Decree stipulates that the consent of the landlord is not to be unreasonably withheld where the prospective assignee or sub-leasee is "respectable and responsible person"⁵. In English law the proviso as to reasonableness is general, not confined to cases where the prospective grantee is "a respectable and responsible person"⁶. It follows that under the Ghanaian provisions the landlord can unreasonably withhold his consent if the prospective grantee is not a respectable and responsible person⁷.

In English law the considerations affecting the reasonableness or otherwise of withholding consent include the effect of the proposed grant on the use and occupation of the leased premises or kindred matters arising either during or after the tenancy⁸, the effect the transaction would have on the ability of the landlord satisfactorily to let different parts of the property⁹, and the proper management of the premises¹⁰.

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1. It is impossible to lay down rules as to what facts constitute effective passing of occupation. Each case will have to be considered on its own peculiar circumstances.
 2. The use of this device to circumvent the Rent Acts is well known in England.
 3. S.23 (1) & 3rd Sched., Pt.I.
 4. Rutter v. Michael (1967) 201 E.G.299
 5. S.23 (1) & 3rd Sched., Pt.I.
 6. Landlord and Tenant Act, 1927, S.19 (1). It applies only if the covenant is a qualified one (i.e., without the consent of landlord).
 7. It may, however, be that in practice this does not constitute much of a divergence. It may be that if the prospective tenant is not a respectable and responsible person then the landlord's refusal to give consent would be reasonable and that the same result would follow under English law.
 8. Houlder Bros Co v. Gibbs [1925] Ch.575; Swansea v. Forton [1949] Ch.143
 9. Premier Confectionary Co v. London Commercial Sale Rooms [1933] Ch.904.
 10. See Houlder Bros v. Gibbs supra, per Pollock M.R. at; Viscount Tredegar v. Harwood [1929] A.472.

Whether the withholding of consent is reasonable or not must be determined not on abstract considerations, but in the light of the particular circumstances. It was thus stated by Jlagge J.A., in Barclays Bank v. Thome:

"A lessor considering whether to withhold his consent or not is to act reasonably, not arbitrarily or capriciously, but prudently in his own self-interest . . . The issue whether or not the respondent in withholding his consent acted reasonably and prudently in his own self-interest is a matter of fact to be deduced from the evidence"¹.

In English law it is not clear whether the test of reasonableness is objective or subjective². The opinion of Jlagge J.A., quoted above, would seem to indicate that in Ghana the test would be an objective one. It is submitted that this is the better approach and that the landlord's reasons for his decision are irrelevant:

"In short, what must be tested for unreasonableness is the withholding and not the landlord, the act not the man"³.

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1. [1973] 2 G.L.R.137, 147. (The case involved alteration).
 2. See Re Smith's Lease [1951] 1 All E.R.346, per Roxburgh J., at 349; contra, Lovelock v. Margo [1964] 2 All E.R.13, per Denning M.R. at 15.
 3. R.E. Megarry, Note, (1963) 79 L.Q.R.479, at 482.

4. Effect of breach of the covenant

If the tenant disregards such a qualified covenant and makes a grant of the premises or any part thereof without the consent of the landlord what would be the result?

If he omits to apply for consent he is liable in any event for damages. It is essential that the consent of the landlord is sought, however unreasonable a refusal would be.

The tenant may be liable to forfeiture if the covenant is supported by a proviso for re-entry. It is important to note that the implied covenant in the Conveyancing Decree does not contain a proviso for re-entry. Breach of the implied statutory obligation will not entitle the landlord to re-enter unless the implied covenant is extended to give a right of re-entry¹.

Even where the covenant is fortified by a right of re-entry consequent on its breach and there is a breach of the covenant this does not imply that the assignment or sub-lease is void ab initio². The landlord may bring an action for ejectment against the assignee or sub-tenant, but the courts now have the right to grant relief from such forfeiture, having regard to the circumstances of each particular case³. In Schandorf v. Zeini⁴, Amissah J.A., relied on English cases and section 146(2) of the Law of Property Act, 1925⁵ as giving the Ghanaian courts the power to grant relief in the appropriate circumstances. This power is now statutorily conferred by section 30(2) of the Conveyancing Decree⁶.

1. Bassil v. Said Road (1957) 3 W.A.L.R. 231. This case holds that breach of the express covenant not to assign, sub-let or part with possession does not empower the landlord to re-enter on its breach if it is not supported by a forfeiture clause.

2. Schandorf v. Zeini [1976] 2 G.L.R. 418, per Amissah J.A. at 437.

3. *ibid.*

4. *ibid.*

5. By the Courts Act, 1971, S.111 this and other sections of the Law of Property Act, 1925 became part of the common law of Ghana.

6. For a discussion of forfeiture and relief from forfeiture see Chapter 8, *infra*
pp. 292-305

In English law, if the tenant makes a formal request for consent and meets with a refusal then, provided the refusal is in fact unreasonable, he incurs no liability if he proceeds to make the grant without the landlord's consent. The law was thus stated by Neville J., in a case where the landlord had expressly covenanted not to withhold his consent to an assignment to a "respectable and responsible person":

"It is obviously a formality to apply for the consent of the landlord in a case where under the terms of the covenant he has no power to prevent the assignment by withholding his consent. It matters not where the proposed assignee is a respectable and responsible person whether the landlord gives or does not give his consent. The cases shown that if on the one hand . . . the landlord had been asked and has withheld his consent, the lessee retains his interest under the lease, whereas if he has not been asked and therefore is unable to give the consent that he should give, the withholding of which is inoperative if the request he made, then the whole of the property of the lessee becomes the property of the lessor. It certainly seems strange that so small and perfectly indifferent a matter should make such a difference but so stands the law"¹.

1. Lewis & Allenby Ltd. v. Pegge [1914] 1 Ch.782.

5. No payment to be exacted for consent to be granted

By section 34 (1) of the Conveyancing Decree, 1973, the landlord may not require the payment of any money for or in respect of a licence or consent to assign, sub-let or part with possession of the leased premises; unless express provision for such payment is contained in the lease or tenancy agreement. This does not, however, preclude the landlord from recovering any reasonable legal expense incurred in the grant of such licence or consent¹.

6. The effect of consent

By the Conveyancing Decree, 1973, section 33 (1) (a) the consent of the landlord shall, unless a contrary intention is expressed, extend only to the assignment, sub-letting or parting with possession specifically authorised and to none other. All the landlord's rights remain in force and are available against any subsequent assignment, sub-letting or parting with possession².

The position was different prior to 1971. Up until then the law was the rule laid down in Dampor's case.³ This was that consent once given extended to subsequent acts of the tenant.⁴

7. Rent Act, 1963

The Rent Act, 1963 (Act 220) also controls the sub-letting of residential premises. 'Premises' is defined in the interpretation section of the Rent Act as "any building, structure, stall or other erection or part thereof, movable or other wise, which is the subject of a separate letting"⁵

1. Section 34 (2).

2. Section 33 (2).

3. (1603), 4 Co. Rep 119 b .

4. The rule is also abrogated in England by section 143 (3) of the Law of Property Act, 1925. This is one of the provisions made applicable to Ghana by the Courts Act, 1971.

5. Section 36.

By section 22 (1) of the Rent Act, 1963, a monthly or shorter tenant shall not sub-let without the written consent of his landlord. It is important to note that in this case there is no proviso that the landlord's consent is not to be unreasonably withheld in the case of a respectable or responsible prospective sub-lessee. It may be that the legislature has decided that in all such short tenancies the landlord's refusal to consent should not be questioned. In Osekre v. Saah¹ plaintiff let his premises to 'T' on a monthly basis. 'T' without the knowledge and consent of the landlord granted a sub-lease of part of the premises to the defendant. When plaintiff sought to eject the defendant-assignee, defendant argued that he was a sub-tenant and was therefore protected by the Rent Act, 1963. It was held by Edusei J., that since the purported assignment was without the consent of the landlord, the defendant was unlawfully let into possession².

Edusei J., does not examine what the effect of such unlawful sub-letting is. He assumed that because section 22 (1) prohibits a monthly tenant from sub-letting without the written consent of the landlord, therefore, such sub-letting is ineffective³.

With respect, this is not good enough. The sub-letting may be unlawful; but this does not dispose of the question; what legal consequences flow from such unlawful activity? In English law, it is a notorious principle that the covenant against assignment or sub-letting does not by itself invalidate an assignment or sub-lease as against the grantee; but that there will be a breach of the covenant which, if reinforced by a forfeiture clause may result in the termination of the tenancy. Even in such cases the sub-lessee can apply for relief. These principles have been accepted and

1. [1967] 1 G.L.R.144.

2. *ibid.*, at p.147.

3. It may be pointed out that this case did not involve the effect of a sub-tenancy granted in contravention of a covenant after the landlord has been granted possession. Where the courts have consistently held that such an unlawful tenant would not be protected.

applied in Ghana¹. In Schandorf v. Zeini, Amissah J.A. said:

" . . . a sub-lease in contravention of the covenant always gives the head-lessor a right to damages and he may determine the lease but the sub-lease is not void ab initio"².

The Rent Act, 1963 does not fortify its provisions against sub-letting with a forfeiture clause³. The Rent Act, 1963 provides that breach of any of its provisions is a criminal offence⁴. A monthly tenant who sub-lets without the written consent of his landlord therefore commits a crime⁵. But the fact that the tenant/sub-lessor has committed a crime does not necessarily imply that the purported grant is void.

It may, however, be that Edusei J., considers that the provisions of the Rent Act, 1963 need not be construed in the same way as express covenants or, indeed, the covenants implied by the Conveyancing Decree⁶. It may also be that on policy grounds monthly tenants should not be allowed to get away with sub-letting or assigning without the consent of the landlord; if this is so the learned judge did not articulate those policy considerations. It is also arguable that the sub-tenant should not be able to rely on the Rent Act, 1963 when the sub-tenancy had been granted contrary to the provisions of the Act⁷.

It is not being *Suggested* that the learned judge's decision was demonstrably wrong, only that it was not inevitably right - as a result of its failure to consider all the issues.

1. See Basil v. Said Rqad (1957) 3 W.A.L.R.231; Schandorf v. Zeini [1976] 2 G.L.R.418; Conveyancing Decree, 1973, S.30.

2. *supra*, at 437.

3. Nor does the Conveyancing Decree, 1973.

4. S.25 (1) (i).

5. Taking such a sub-lease, however, is not a crime.

6. The learned judge himself relies on an English case Maley v. Fearn [1946] 1 All E.R.583, where an express covenant was involved.

7. The Rent Act, 1963 does not, however, prohibit the taking of a sub-lease granted without the consent of the landlord; it only prohibits the granting of such a tenancy.

Section 22 (2) of the Rent Act, 1963, provides that in all other tenancies of residential premises the premises shall not, in the absence of agreement to the contrary, be sub-let for a period in excess of the tenancy. This is a strange provision since it is a notorious principle of Ghanaian law that nemo dat quod non habet. It has the effect, though, of making it a criminal offence!¹

Section 22 (3) is a more interesting provision. It provides that:

"Every person sub-letting his premises shall inform the landlord of such premises in writing within fourteen days after he has so sub-let the premises the fact of such sub-letting and its terms".

This provision will be useful in residential tenancies granted before the Conveyancing Decree came into force², if the tenancy agreement does not contain a covenant against sub-letting. But under the Conveyancing Decree a covenant against sub-letting is implied and personal liability cannot be totally ousted. In such circumstances this provision of the Rent Act, 1973, may create a monster. Is the tenant obliged to supply the landlord with such information after the landlord has consented to grant of the sub-tenancy? If he is, what if he doesn't?³

It does seem that in drafting the Conveyancing Decree, 1973 attention was not given to section 22 of the Rent Act, 1963. The Rent Act does not control all conveyances. But it does control most residential tenancies. The result of this apparent inadvertence to its provisions has been to create confusion. It may however be that the Conveyancing Decree being later in point of time impliedly repealed section 22 of the Rent Act, 1963.

By section 25 (1) of the Rent Act it is a criminal offence to demand or receive "any consideration whether in money or in kind or in any other manner whatsoever" by way of "rent, fine, premium or otherwise" for the grant or assign-

1. S.25 (1) (i).

2. The Decree came into force on 1st January 1974: S.46.

3. By section 25 (1) (i) any person who contravenes the provisions of the Rent Act, 1963 shall be guilty of an offence and upon conviction shall be liable to a fine not exceeding £G 100 (£ ?) or to imprisonment for a term not exceeding six months.

ment of any tenancy¹. Any person found guilty of this offence shall be liable to a fine not exceeding £ G 100 or to imprisonment for a term not exceeding six months or to both².

a. Statutory tenants

A statutory tenant³ cannot assign, sub-let or part with possession of premises⁴. In George Grant & Co.Ltd., v. Tikobo Sawmills Ltd.,⁵ a tenant purported to assign his rights to another person after the expiry of his lease. It was held that a statutory tenant is only a law-protected tenant and has no, proprietary interest in the premises. He therefore cannot make a legal assignment of the property to a third party. The purported assignment was there a nullity. This decision was followed in U.T.C. v. Karam⁶. In this

1. This is another in the long list of crimes created ad hoc by statutes concerned primarily with immovable property law. See also, e.g.: Conveyancing Decree, 1973, S.7 (2); Land Registry Act, 1962 (Act.122), S.34; Administration of Lands Act, 1962 (Act 123), S.27; Farm Land (Protection) Act, 1962 (Act 107), S.3. It should not, however, be supposed that this practice has stopped. It has not had this effect because (a) ^{people} do not really consider it as a 'crime', and (b) some people commit crimes. The multiplication of criminal offences in support of the civil law is a development which must be discouraged. For reasons to be discussed in the last chapter those aspects of the law are not enforced. When large parts of law are not complied with and not enforced, this anarchy permeates the whole system and the very foundations of a law-state are threatened.
2. Rent Act, 1963 (Act 220), S.25 (1) (i).
3. For definition of statutory tenant, see *supra*, pp. 87-88.
4. Rent Act, 1963 (Act 220), S.29 (1).
5. (1969) C.C.119. The case involved a business letting but the same principle will apply to residential tenancies.
6. [1975] 1 G.L.R.212. The case involved a business letting but the same principle will apply to residential tenancies.

case the tenant failed to exercise his option to renew but remained in occupation of the premises. While holding over the tenant purported to under-let the premises. The landlord sued for recovery of possession. It was held that the tenant had after the expiry of the original term become a statutory tenant and he therefore could not sub-let.

e. Illegal or immoral user

The tenant further covenants:

"Not to use or permit the premises leased or any part thereof to be used for any illegal or immoral purpose"¹

This is a provision enjoining the tenant to use the premises in a lawful and decent manner. Illegal user will prohibit use of the premises for purposes which by Ghana law are unlawful, such as gambling or treason. It is important to note that illegality is not confined to criminality. Immoral user is, however, more problematic—morality being a more difficult concept to define and being in most instances subjective. For example, would a tenant be in breach of this covenant if he sells pornographic magazines on or runs a brothel in the premises?

f. Nuisance or annoyance

The tenant impliedly covenants:

"Not to do or permit anything to be done in or upon the premises which may be or become a nuisance or annoyance or cause damage to the covenantee, his tenants, or the occupiers of adjacent or neighbouring premises"².

Neither "nuisance" nor "annoyance" is defined by the Decree. Nuisance has been defined in another context as:

" . . . an act or omission which constitutes or results in an interference with, disturbance of, or annoyance to, another person in the use, exercise or enjoyment of a right, title, ownership or occupation of land, premises, easement or other right connected with land"³

1. Conveyancing Decree, 1973 (N.R.C.D.175), S.23 (1) and 3rd Sched., Pt.I.

2. *ibid.*

3. Kludze, A.K.P., "The termination of leases", (1975) 7 R.G.L., 11 at 19. This definition was formulated in respect of S.17 (1) (c) of the Rent Act, 1963 (Act 220)

Annoyance is wider in meaning and includes whatever reasonable troubles the mind of an ordinary sensible person¹.

It does not appear that this implied covenant is restricted to the enjoyment of property. It does seem that a tenant would be in breach of this covenant if his acts on the premises cause damage to the landlord. For example, if the tenant publishes or permits publication of material impugning the character of his landlord (such publication being done on the leased premises) and this results in the landlord losing some business contracts, it is submitted that the tenant would be in breach of his implied covenant, though the damage caused to the landlord does not affect the enjoyment of a proprietary interest.

What constitutes a nuisance or annoyance or causes damage to others will always remain a question of fact. In Dennis v. Agbetetei² it was held that the pounding of fufu on the top floor of a storey building amounted to a nuisance!³ In Ofori v. Arthur⁴ 'B' granted tenancy of a room to 'A' who in turn sub-let to 'C'. 'C' immediately wrote to the head-lessor alleging that 'A' was disreputable and urging that the original tenancy be granted to him. This application was turned down and 'C' was given notice to quit. When 'C' refused to vacate the room the head-lessor applied for an eviction order on the ground that 'C' was a nuisance. In granting the order, Kingsley-Nyinah J., said:

1. cf. Tod-heatly v. Benham (1887) 40 Ch.280, at 295.

2. (1970) C.C.21. The case was concerned with provisions of the Rent Act, 1963 (Act 220).

3. The case is more fully discussed below, at pp.317-319.

4. (1970) C.C.112. The case was decided on the basis of S.17 (1) (C) of the Rent Act, 1963.

"It is not at all surprising, then, that neither the Rent Regulations, 1964 (L.I.369), nor its parent statute, the Rent Act, 1963 (Act 220), ventures a definition of the word 'nuisance' or the word 'annoyance'. This omission I think entitles one to interpret the word not abstractly, but beneficially, having regard to the very peculiar facts and circumstances of each particular case. I do earnestly hope that when this Act comes to be revised, or amended, the draftsmen would give us a reasonable and practicable definition of these important words 'nuisance' and 'annoyance'¹.

Unfortunately Kingsley-Nyiah J.'s earnest hope was not realized when the Conveyancing Decree, 1973 was enacted.

g. Further covenants implied in a sub-tenancy

The sub-tenant impliedly covenants to discharge all obligations undertaken under the head-lease, except the obligation to pay rent and any other obligation for which the sub-lessor is liable under the head-lease². He also covenants to indemnify the sub-lessor against any claims, damages, costs and other expenses relating to the obligations he has undertaken³.

The sub-tenant further covenants to permit the landlord/sub-lessor his agents and workmen, after giving written notice, to enter the premises at

1. (1970) C.C.112.

2. Conveyancing Decree, 1973, S.23 (2) and 3rd Sched., Pt.II.

3. *ibid*.

all reasonable times for the purpose of enabling the sub-lessor to perform any obligations he has undertaken under the head-lease which are not to be performed by the sub-tenant¹.

h. Further covenants by an assignee

An assignee impliedly covenants to:

"... observe and perform all the covenants, agreements and conditions contained in the lease creating the term or interest for which the land is conveyed and thenceforth on the part of the lessees to be observed and performed"².

He also covenants to indemnify the assignor and his property against all claims, damages, costs and expenses relating to the obligations he has undertaken³.

II. Implied Obligations of Landlords

a. The right to grant

The landlord impliedly covenants that he has capacity to grant the premises in the manner in which it is expressed to be granted⁴. This covenant is implied:

1. Conveyancing Decree, 1973, S.23(2) and 3rd Sched., Pt. II.

2. Conveyancing Decree, 1973, S.23 (2) and 3rd Sched., Pt. III.

3. *ibid.*

4. For the difficulties caused as a result of the system of landholding, see *supra*, pp 90-97.

"notwithstanding anything done, omitted or knowingly suffered by the covenantor or anyone through whom he derives title otherwise than by purchase for value"¹

It is important to note that all that the landlord undertakes under this covenant is that he has capacity to grant the tenancy at the time of the grant. It has no bearing on the future conduct of the landlord or persons claiming through him². In Wilkinson v. Edgesei³, 'A' assigned a lease of land to 'R'. The deed contained only one covenant by 'A' to the effect that he had not at anytime done or been privy to any act which prevented him from assigning the land or whereby any part of the land was encumbered. Three weeks later a third party entered the said land and started to build on it. 'R' then sued 'A' for damages for failure of consideration and for breach of the covenant for quiet enjoyment⁴. It was held that since there was no proof that 'A' had no title to the land or that his lease was invalid, 'R''s remedy lay in an action for trespass against the third party.

b. Quiet enjoyment

By section 22 (1) of the Conveyancing Decree a covenant for quiet and peaceable enjoyment is implied in all residential tenancies.

The position is the same in English law, where the landlord/tenant relationship automatically implies a covenant for quiet enjoyment by the landlord⁵. In English law the implied covenant of quiet enjoyment is excluded by any express covenant for quiet enjoyment contained in the lease or tenancy agreement⁶.

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1. Conveyancing Decree, 1973, S.22 (1) and 2nd Sched., Pt.I.
 2. This is the distinction between the covenant of title and the covenant for quiet enjoyment. The latter covers the subsequent acts or omissions of the landlord and those claiming through him.
 3. [1963] 1 G.L.R.393. This case involved an assignment of land and an express covenant of title; but the principle enunciated is applicable here.
 4. The case was decided on the basis of the common law as it stood in 1874. At that time 'quiet enjoyment' was not implied in leases.
 5. It used to be thought that the covenant was implied from the use of technical words of demise. That view is now discredited: See Budd-Scott v. Daniel [1902] 2 K.B.351; Kenny v. Preen [1963] 1 Q.B.499.
 6. Malzy v. Eicholz [1916] 2 K.B.308; Miller v. Emcer Products [1956] Ch.304.
[1916]

The Conveyancing Decree departs from this position. Under the Decree the statutorily implied covenant can be varied or extended, but the personal liability of the landlord cannot be removed¹. Any such attempt shall be void².

1. Scope of the covenant

The covenant gives the tenant the right to be put into possession of the premises. In the words of the Decree; "the subject-matter expressed to be conveyed shall remain to and be quietly entered upon, received, held, occupied and enjoyed"³ by the tenant. This means that the tenant be placed in actual physical possession at the commencement of the tenancy. It is not enough for only the legal right of possession to be transferred⁴. The covenant also gives the tenant the right to live in the premises without interference or disturbance from the landlord or any person claiming through him⁵.

The right of the tenant to enter upon and live in the premises peaceably is guaranteed, "notwithstanding anything done, omitted or knowingly suffered by the covenantor or anyone through whom he derives title otherwise than by purchase for value"⁶.

The covenant is not for quiet enjoyment in the literal sense⁷. The covenant is aimed not at protecting the tenant from nuisance or noise⁸, but at challenges to the title or possession of the tenant from the landlord or his grantors, successors or assigns⁹.

The covenant extends to the acts ("disturbance or interruption"¹⁰) of the:

"... covenantor or any person conveying by his direction,
or any person through whom the covenantor derives title otherwise

1. Conveyancing Decree, 1973, S.22 (7).

2. *ibid.*

3. Conveyancing Decree 1973, S.22 (1) and 2nd Sched. Pt.I.

4. See Coe v. Clay (1829) 5 Bing.440; Jinks v. Edwards (1856) 11 Ex.775.

5. Conveyancing Decree, 1973, S.22 (1) and 2nd Sched., Pt.I.

6. *ibid.*

7. See Jenkins v. Jackson (1888) 40 Ch. D.71; Mafo v. Adams [1970] 1 Q.B. 548, per Sachs L.J. at 557.

8. For these tenant has his remedy in tort.

9. It may be otherwise, though, if noise or dirt renders premises uninhabitable.

10. Conveyancing Decree, 1973, S.22 (1) and 2nd Sched., Pt.I.

than by purchase for value, or any person rightfully claiming (not being a person claiming in respect of an interest to which the conveyance is expressly made subject) by, through, under or in trust for any of the foregoing persons"¹.

In English law, the covenant has been held to extend to the rightful and wrongful acts of the landlord; but only to the lawful acts of persons claiming through him². The reason for this is said to be that the tenant would have his remedy in tort against the unlawful acts of others³. This is different from the English-law position between vendor and vendee where the covenant extends to the unlawful acts of persons claiming through the vendor⁴. The Conveyancing Decree does not draw any distinction between the lawful and unlawful acts of persons claiming through the landlord; both would seem to be covered by the covenant⁵.

The covenant does not give the tenant any remedy if he is ejected or disturbed by a person having a superior interest⁶. This rule is very important because of the hierarchical system of land-holding (with the distinction between powers of control and rights of benefit), and the manner in which the premises were constructed which determine who can create what interest in the premises and for how long⁷.

2. What amounts to breach?

The *basic example of breach* of the covenant for quiet enjoyment occurs when the landlord enters the premises prior to the expiration of the tenancy, and forcefully removes the tenant. The covenant protects the tenant from acts which cause interference with his enjoyment of the property. Thus, where the landlord in order to get rid of a tenant causes damage to the property, this was held to be in breach of the covenant for quiet enjoyment. In Karam v. Ashkar⁸, the landlord demolished part of the premises so as to make it unsafe

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1. Conveyancing Decree, 1973, S.22 (1) and 2nd Sched., Pt.I.
 2. Malzy v. Eicholz [1916] 2 K.B.308; Matania v. National Provincial Bank Ltd. [1936] 2 All E.R.633.
 3. Hayes v. Bickerstaff (1669) Vaugh.118; Lucy v. Leviston (1673) Freem.103.
 4. See Megarry and Wade, The Law of Real Property, London, 1975, pp604-677.
 5. This may be due to the way in which ~~the~~ Conveyancing Decree, perhaps rather clumsily, lumps both sale and tenancies together.
 6. See Jones v. Havington [1903] 1 K.B.253. (F.N.7.8. p.t.o.)

for tenants portion of the premises to remain in use. It was held that this was a breach of the covenant for quiet enjoyment. Under the Rent Act, 1963 (Act 220) it is a criminal offence to do any act whatsoever, or refrain from performing any of the obligations undertaken under a lease or tenancy agreement, if this is done with intent to compel the tenant to give up possession¹.

In English law it has been held that there need not be physical interference with the premises for the covenant to be breached. Thus where noise, dust and dirt from building operations on adjacent property render the premises uninhabitable this may constitute a breach of the covenant². The covenant is also broken if the landlord threatens the tenant by letters and by shouting and banging on the front doors³, or cuts off gas and electricity supplies⁴. It is our submission that the terms of the covenant as set out in the decree are sufficiently wide to cover all these instances. The premises is to be enjoyed "without interruption or disturbance" from the landlord; and this, it is our submission, cover all cases where the acts or omissions of the landlord interfere with the tenant's enjoyment of the property.

3. Constructive Eviction⁵

Constructive eviction is a result of breach of the covenant for quiet enjoyment. It is established when the tenant shows that the landlord has prevented his enjoyment of the property; and that consequent upon that he, the tenant, has abandoned the premises. In such a case the tenant's liability for rent ceases. He may also sue for breach of the covenant.

7. Supra, pp. 90-97.

8. [1963] 1 G.L.R.138. The case was decided on the basis of an express covenant for quiet enjoyment.

1. See. 27 (1)

2. Matania v. National Provincial Bank [1936] 2 All E.R.633.

3. Kenny v. Preen [1962] 3 All E.R.814. This would constitute a breach of S 27 (1) of the Rent Act, 1963 (Act 220).

4. Pereira v. Vandiyam [1953] 1 All E.R.1109. This will also be a criminal offence.

5. This and other related doctrines are more fully treated in a later chapter: See infra, pp. 225-226

4. Non-derogation from Grant?

The Conveyancing Decree, 1973 does not expressly provide that there shall be implied in all conveyances a covenant that the grantor shall not derogate from his grant. The effect of the absence of a specific covenant against derogation from the grant is not clear. Does it mean that this covenant is not to be implied in conveyances; or does it mean that the common-law covenant against derogation from the grant will continue to be implied? In our considered opinion the absence of a specific covenant against derogation from the grant is deliberate; and this is because the content of the covenant for quiet enjoyment is expressed so widely¹ that most of the set of facts which would normally amount to breach of the covenant against derogation from the grant would amount to a breach of the covenant for quiet enjoyment under the Decree. Furthermore, the principle that the grantor must not derogate from his grant is one of general application - not being restricted to conveyances².

c. Freedom From Encumbrances

The landlord further covenants that the property is "freed and discharged or otherwise sufficiently indemnified by the covenantor against" all interests, encumbrances, claims and demands (other than those to which the conveyance is expressly made subject)"³. The covenant extends to the acts and omissions of the landlord and those claiming through him; and to the acts and omissions of persons through whom he claims except those from whom he has taken the property for valuable consideration⁴.

1. See 2nd Schedule, Pt.I.

2. See Palmer v. Fletcher (1663) 1 Lev.122; Harmer v. Jumbil (Nigeria) Tin Areas Ltd. [1921] 1 Ch.200 at 225, where Younger L.J. said that it is "a principle which merely embodies in a legal maxim a rule of common honesty". ; also (1964) 80 L.Q.R.244 (D.W.Elliott).

3. Conveyancing Decree, 1973, Sect.22 (1) and 2nd Sched. Pt.I.

4. *ibid.*

d. Further Assurance

The landlord impliedly covenants that he and any person conveying by his direction, and any person through whom he derives title otherwise than by purchase for value will, at all times and at the expense of the tenant, execute assurances and do everything that is right and possible in order to perfect the title of the tenant and those deriving title through him¹.

e. Further Covenants Implied in a Assignment or Sub-lease

In a tenancy created by way of an assignment or sub-lease, there shall be implied a covenant by the assignor/sub-lessor that:

" . . . the head lease is at the time of the conveyance a good, valid and effectual lease of the property conveyed, and is in full force, unforfeited and unsurrendered, and has not become void or voidable"²

Furthermore the assignor/sub-lessor impliedly covenants that (1) all rent payable under the head lease by himself have been paid up at the time of the conveyance; and (2) all the covenants, conditions and agreements contained in the head-lease which are to be performed by him have been observed and performed up to the time of the conveyance³.

f. Further Covenants Implied in a Sub-lease

In a tenancy created by way of a sub-lease, the landlord/sub-lessor impliedly covenants that for the duration of the sub-lease he will pay the rent reserved by the head lease and perform those covenants of the head lease which the tenant/sub-lessee does not undertake to perform⁴.

1. Conveyancing Decree, 1973, Sec.22 (1) and 2nd Sched., Pt.I.

2. Conveyancing Decree, 1973, Sec.22 (2) and 2nd Sched., Pt.II.

3. ibid.

4. Conveyancing Decree, 1973; Sec.22 (3) and 2nd Sched., Pt.III.

Furthermore in a tenancy created by way of a sub-lease the Decree implies a covenant by the landlord/sub-lessor that at all reasonable times he will produce the head lease for the inspection of the tenant/sub-lessee or any person authorised in writing by the tenant¹. The landlord/sub-lessor is also obligated to produce the head-lease in any proceedings of a court or Commission of Inquiry or on any occasion on which production is reasonably required for proving or supporting the title of the tenant². The landlord/sub-lessor also covenants to deliver to the tenant/sub-lessee true copies of the head-lease³; and to keep the head lease safe, whole, uncanceled and undefaced⁴.

These are very strange provisions in as much as it assumes that in every case of sub-lease there is a head lease which can be produced, copied or defaced. These imply the existence of a document or writing; and yet by section 3 (1) of the Decree tenancies for not more than three years taking effect in possession are excused from the requirement of writing, as are equitable tenancies under section 3 (2).

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1. Combined effect of section 22 (3) and 35 (2) (a) (i).
 2. Combined effect of section 22 (3) and 35 (2) (a) (II).
 3. Combined effect of section 22 (3) and 35 (2) (b).
 4. Combined effect of sections 22 (3) and 35 (2) (c).

c. EXPRESS COVENANTS

In addition to the covenants implied in all tenancies by the Conveyancing Decree, 1973, there are a number of others which are very often found in properly-drawn leases or agreed upon by the parties which need consideration.

d. Covenant to Insure

In the absence of an express covenant to insure, neither the landlord nor the tenant is obligated at common law to insure. It has thus been the practice in England, except in short leases, to provide expressly for insurance of the premises against fire and other damage. In Ghana covenants to insure are not common in tenancy agreements¹. A colleague² who has researched into insurance law and practice in Ghana has found that in the small number of cases where premises are insured, this is done by the landlord, and this not as a result of a covenant in the lease or agreement but because he considers it to be a prudent thing to do.

Where there is a covenant to insure, it has been held by the English courts that omission to keep the premises insured for any period, no matter how short, constitutes a breach of the covenant³. There is authority for the proposition that there can be no breach of covenant to insure where no amount is stipulated in the covenant. In Boston v. Khemland Bros.⁴ the tenant covenanted, inter alia to insure the premises. The covenant was fortified by a forfeiture clause. When the tenant failed to insure, the landlord sued for recovery of possession. It was held that the tenant was not in breach of his covenant because no amount was stipulated in the covenant. The learned judge gave no reasons for his decision; nor did he cite any authority for this

1. In a survey of 2,000 residential tenancies in only one lease has the tenant covenanted to insure.

2. F. Akyeampong, Univ. of London, Ph.d. student.

3. Penniall v. Harborne (1848) 11 Q.B.368.

4. [1962] 1 G.L.R.68.

proposition¹. It is not clear from the report what the terms of the covenant in question were. It may be that the decision is based on an appreciation of the practical implications of a covenant to insure which does not stipulate any amount or require that the premises be insured at full value. For theoretically the tenant could have insured it for 1p. But this is an extreme example; and even under such a covenant the tenant could not insure the premises at zero value. It is thus our view that this decision is questionable and should not be followed. It must also be emphasised that with express covenants, the extent of the obligation of the covenantee depends on the words used and the circumstances in which they appear². Consequently, decisions which have placed a particular interpretation on a certain set of words are not to be regarded as authorities for the proposition that they should always have that meaning³.

II. Covenants Restrictive of User

In English law, residential tenancies often contain a covenant restricting user of the premises to residential purposes only and against any trade or business being done on the premises. In Ghana such terms are uncommon⁴; and frequently tenants carry on their business, or parts thereof in the rented premises with the acquiescence of the landlord. This is, in our view, due to the peculiarities of Ghanaian society and her trading and business patterns. In Ghana many people, like traders, bread bakers, kenkey sellers, tailors and seamstresses, carry on their businesses, or parts of their business, in

1. See [1962] 1 G.L.R.68 at pp.72-73

2. See Westacott v. Hahn [1918] 1 K.B.495, per Pickford L.J. at p.505 and Scrutton L.J. at p.511; also Holiday Fellowship v. Hereford [1959] 1 W.L.R.211.

3. *ibid.*

4. In the survey of 2,000 residential tenancies only nine leases contained express covenants restricting user to residential purposes only.

the premises where they reside. We would thus suggest that in construing covenants which, in the handful of cases, restrict user to residential purposes only, the courts should take judicial notice of these social facts and give a liberal construction to such covenants. Cases like Jones v. Christy¹ where the garaging in the demised premises of a taxi which the tenant used for his business was held to be in breach of a covenant to use the premises for residential purposes only, should not be followed in Ghana.

III. Option to Renew

Quite apart from any statutory right of continuation of the tenancy², the lease itself, not uncommonly provides expressly for renewal at the end of the original term by way of an option to the tenant to renew.

Options for renewal run with the land and with the reversion and cannot be revoked as long as the option is exercisable³.

(a). Exercise of the option

The option is normally expressed to be exercisable upon notice being given to the landlord. Before the Conveyancing Decree came into force⁴, such notice need not be in writing—unless the terms of the lease expressly state that notice must be in writing. In Ogde v. Pearl & Dean⁵, premises were let for one year with an option to renew for a further period of four years, "provided notice of intention to renew the tenancy is given to the landlord". The tenants gave the landlord an oral notice; and on the expiry of the first term continued in occupation and paid rent. Before the four years, however, the tenants vacated the premises after a month's notice. The landlord sued

1. (1963) Sol.Journal 374.

2. See *infra*, pp. 279-333.

3. Moukarzel v. Hannah 12 W.A.C. 125; Re Hunter's Lease Giles v. Hutchings [1942] 1 All E.R. 27 at p. 60.

4. By S. 46 the Decree came into force on January 1st, 1974.

5. [1961] 1 G.L.R. 142.

to recover rent for the unexpired term. The tenants contended that they had not exercised their option because their notice was not in writing. It was held that the notice to exercise the option need not be in writing unless the covenant so stipulated. Ollennu J., said;

"I hold further that it is not necessary in an agreement of this nature that notice of the exercise of the option should be in writing"¹.

In fact it is not even necessary that a formal notice—oral or written—be given in such a case. Notice can be inferred from the conduct of the parties. In Moukarzel v. Hannah² premises were let for a term of six years. The tenant had an option of renewal for a further term. Before the first term could expire the parties entered into an agreement for the tenants to make some improvements to the premises and debit the landlord with the cost as rent for a period of term. On the expiry of the original term, the landlord sued for recovery of possession. It was held that it was not necessary for the option to be exercised in writing and that the conduct of the landlord and the resultant action by the tenant indicated that they intended that the tenancy be renewed. The law was thus stated by Harragin C.J.:

" . . . a lessor by his treatment of his tenant may lead him to believe that he will renew the term of his lease, and if on the faith of this belief the tenant expends his money . . . , the lessor will be compelled to give him such renewal . . ."³.

What conduct amounts to such estoppel is, of course, a question of fact to be decided on the circumstances of each particular case. The mere acceptance of rent is, however, not sufficient to ground such estoppel. In U.T.C.

1. [1961] 1 G.L.R.142 at p.143

2. 12 W.A.C.A.125.

3. *ibid.*, at p.125

v. Karam¹ plaintiffs let their premises to the defendants for five years and ten months. The defendant had the option to renew for a further term of ten years. The defendant continued in possession after the expiry of the first term and continued to pay rent. The plaintiff gave him several notices asking him to quit the premises. After the defendants had failed to vacate the premises, the plaintiff sued for recovery of possession on the ground that the defendant had failed to exercise his option to renew. The defendants contended that the plaintiffs were estopped by conduct—the acceptance of rent—from denying that the option has been exercised. It was held that the mere acceptance of rent, after the expiration of the tenancy, did not justify the inference that the option has been exercised by the defendant and that a new contractual tenancy has been created.

The Conveyancing Decree, 1973, has impliedly overruled some of these decisions². Section 39 of the Decree provides that:

"Unless otherwise provided in a conveyance, any notice required to be given under the conveyance shall be in writing . . ."

Thus, with the coming into force of the Decree, any notice to exercise an option to renew must be in writing, unless there is contrary agreement.

It is not clear, however, what the position will be if the conveyance simply gives the tenant the option to renew without stating that it is exercisable on notice being given. Can such an option be exercised by conduct? On the face of it this would seem to be possible since 'notice' is not 'required'. It may however be that the courts will take the view that the clear intention of the Conveyancing Decree, 1973, is to impose a requirement of writing in as

1. [1975] 1 G.L.R.212.

2. Ogde v. Pearl & Dean, op.cit., and Moukarzel v. Hannah, op.cit.

many cases as possible¹; and that one cannot manifest an intention to exercise an option by conduct because such a manifestation of intention is 'notice' and by section 39 such 'notice' must be in writing.

Provided no time is fixed for exercise of the option, it can be exercised at any time during the landlord and tenant relationship. In Moukarzel v. Hannah², the facts of which we have already seen, it was further held by Harragin C.J., that:

" . . . as no time has been stated in which the option is to be exercised, the right to do so will continue so long as the relationship of landlord and tenant exists even though the original tenancy has expired"³.

Where the tenant has an option to renew, the landlord has no right to refuse to renew the tenancy unless the tenancy is otherwise determined by some other reason, such as breach of a covenant fortified by a forfeiture clause. In Ampiah v. G.B. Ollivant⁴, tenants who had covenanted to keep the premises in repair and had an option to renew sought to exercise the option. The landlord refused to renew the tenancy but the tenants remained in possession after the expiry of the first term. The landlord sued for recovery of possession on the erroneous grounds that the lease should have contained a 'usual' covenant for re-entry for failure to repair. It was held inter alia that the tenants were not in breach of their covenant to repair and that the landlord had no right to refuse to renew the tenancy.

1. See the memorandum to the Decree.

2. 12 W.A.C.A.125.

3. at p 125.

4. (1948) O.C.(Land) '48 - '51, 46.

D. 'USUAL' COVENANTS

As ~~has been~~¹ seen, tenancy agreements and leases are sometimes preceded by a contract to create a tenancy. In such a case the rule at common law is that the 'usual' covenants shall be implied in the contract. In Ampliah v. G.B.Ollivant², the execution of a lease was preceded by a contract for a lease. The contract made no mention of the "usual and proper covenants". The lease contained a covenant by the tenant to keep the premises in repair. The landlord alleged breach of the covenant to repair; and in an action for recovery of possession argued that a 'usual' covenant should be implied giving him a right of re-entry for breach of the covenant to repair. It was held by Quist J., that the law implied that the 'usual' covenants should be inserted even if the contract for a lease did not mention them³.

'Usual' covenants add little more to the lease or tenancy than the covenants which would in any event be implied at common law. With the coming into force of the Conveyancing Decree, most of the 'usual' covenants are statutorily implied in leases⁴ - which include contracts to create tenancies⁵.

The following covenants and conditions are always 'usual'⁶.

1. A covenant by the landlord for quiet enjoyment.
2. A covenant by the tenant to payment.

1. Supra, pp 401-411.

2. (1948) D.C. (Land) 48-51, 46.

3. It was, however, held that as a 'usual' covenant the proviso for re-entry applied only to non-payment of rent.

4. The exceptions are the covenants by the tenant to pay rates and taxes, to keep the premises in repair and the proviso for re-entry for non-payment of rent.

5. See 45 (1) & (2). We are not of the view that 'usual' covenants will cease to be implied in leases. The Conveyancing Decree is not a comprehensive code of Conveyancing law; nor of the law of landlord and tenant. The common law rules are therefore unless the Decree provides otherwise.

6. See Hampshire v. Wickens (1878) 7 Ch.D.555.

3. A covenant by the tenant to pay rates and taxes other than those which the landlord is statutorily obliged to pay.
4. A covenant to keep and yield the premises in repair.
5. A covenant to permit the landlord to enter and view the state of repair in cases where the landlord has undertaken to make some repairs.
6. A condition of re-entry for non-payment of rent, but not for breach of any other covenant¹.

In English law there is authority for a more liberal interpretation of the word 'usual' which requires the question to be decided as one of fact rather than of law, so that as the practice changes, so may the 'usual' covenants². It is doubtful whether in Ghana a court would be willing to imply additional terms, other than those implied by the Conveyancing Decree, as 'usual' covenants.

1. Ampiah v. G.B.Ollivant, op.cit.; Sackey v. Ashong (1956) 1 W.A.L.R.108

2. Hampshire v. Wickens (1878) 7 Ch.D555, per Jessel M.R., at p.561 ; Flexman v. Corvett [1930] 1 Ch.672 at p.678 , per Maugham J.

CHAPTER FIVE
MAINTENANCE AND REPAIR

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"The first object of landlord - tenant law should be the making of repairs and the general maintenance of the property"¹.

Introduction

This statement of priorities may not appear to be applicable to Ghana in view of the virtual absence of legislation and public debate on the subject and the contrasting amount of legislative time and public debate spent on the other two sides of the triad—rent restriction and security of tenure.

But the maintenance and repair of residential property is of crucial importance. It is important to the landlord interested in maintaining the value of his reversion. It is also important to the tenant who wants livable accommodation. But perhaps crucially, it is important for society; for failure to maintain and repair will result in the creation of slums with its effects on productivity and morale and the attendant problems of disease, crime, vandalism and adult and juvenile delinquency.

It is thus crucial that there be a good, effective and equitable regime of laws for the maintenance and repair of residential property, the subject-matter of a tenancy.

In most properly-drawn leases there is usually agreement on the repairing obligations of the respective parties². The common-law position is that parties to a tenancy agreement could "agree" on their repairing obligations without interference—i.e., apart from the tenant's duty to use the premises in a tenant-like manner and not to commit waste. Quite apart from the disadvantaged position of the tenant in a landlord's market situation, this common-

1. United States model Urban Residential Landlord and Tenant Act.

2. Of the 352 written tenancy agreements in the survey of 2,000 residential tenancies, 316 contained provisions affecting the repairing obligations of the parties. All the 133 properly-drawn and executed leases contained covenants to repair.

law position can have serious consequences on the state of residential property in Ghana. This is because most tenancies are created orally and informally with no provision made for repair¹.

The role of the law in this situation is far from clear. There appears to be a complex conflict of interests and the law must get the balance right if the law is to be seen to be fair and is to succeed in its desired policy - objectives. On the one hand, society as a whole stands to suffer if property is not maintained and repaired; on the other hand landlords and tenants may suffer (or, more probably, fail to comply) if their repairing obligations are too onerous. Underlying all these is the crucial question of finance. Simply put, who is to pay for the maintenance and repair of residential property, the subject-matter of a tenancy? Some countries, appreciating the wider societal implications of the maintenance and repair of residential property, have placed part of the obligation to repair on society (local authorities in the case of England and Wales). In the present economic conditions of Ghana state aid in the maintenance and repair of houses is not a live option. It may, however, be worthy of consideration if and when conditions improve.

A. THE OBLIGATIONS OF THE LANDLORD

I. Implied warranty of habitability²

The Conveyancing Decree, 1973 does not impose an obligation on landlords to grant tenancies of premises in a habitable condition. There is no implied covenant by the landlord that the premises he is letting is fit for human habitation. This is the general position at common law, where there is no implied

1. Field research indicated that in these cases most landlords carried out external repairs and repairs affecting 'common parts' like kitchen, roofing, and lavatory facilities. Some tenants said they painted the interior of their rooms themselves; but they consider this to be because of their desire to keep their rooms 'nice' rather than the discharge of a legal obligation. Gratuitous repair, it must be noted, does not impose a legal obligation to repair.
2. The implied warranty of *habitability* is used here restrictively in a consideration of the condition of the premises at the inception of the tenancy. The condition of the premises during the course of the tenancy is considered at pp. 176-187.

warranty by the landlord of an unfurnished house (flat or room?¹) that the premises are reasonably fit for occupation². At common law, there is an implied warranty of habitability in lettings of furnished houses, flats or rooms³. In such cases the habitability of the premises is a condition of the tenancy and this must be fulfilled before the commencement of the tenancy⁴. This qualification of the general rule is of limited use/importance in Ghana, where there are only a few furnished lettings - these being in the upper ranges of the market for diplomatic missions, financial institutions, public corporations, etc. Fieldwork carried out by the present writer did not disclose any in the lower and middle ranges of the market.

The absence of an implied warranty of habitability in residential tenancies is based on the theory that a tenancy created an estate in land to which the maxim caveat emptor applied. This required that the tenant should examine the premises and thereafter take it as he finds it. The landlord is not taken to warrant that the premises are fit for habitation. The fact that the tenant may not have inspected the premises or may not have noticed some less obvious defects is considered irrelevant. This view is epitomised in the following dictum:

" . . . fraud apart there is no law against letting a tumbledown house, and the tenant's remedy is upon his contract if any"⁵.

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1. Glanville Williams has argued cogently that it is still open for an English court to hold that a warranty of habitability is implied in lettings of flats or rooms: See "Dangerous premises, the duties of non-occupiers in respect of", (1942) 5 M.L.R.194.
 2. Hart v. Windsor (1844) 12 M & W.68; Cruse v. Mount [1933] Ch.278; Sleafer v. Lambeth Council [1960] 1 Q.B.43. These authorities are not as strong as sometimes supposed. It has been argued that the law could easily have developed in the opposite direction: See Williams, G., *supra*; Reynolds, J.I., "Statutory covenants of fitness and repair", (1974) 37 M.L.R.377
 3. Smith v. Marrable (1843) 11 M. & W.5; Collins v. Hopkins [1923] 2 K.B.617.
 4. Wilson v. Finch (1877) 2 Ex.D.336.
 5. Robbins v. Jones 15C.B. (N.S.) 221, per Earle C.J. at 240.

After a tenant inspects premises, he takes the risk of their condition; and he cannot complain because the landlord did not disclose defects in respect of which he has opportunity of informing himself¹. If the tenant intends to hold his landlord responsible for the habitability of the leased premises, he should have a covenant to that effect incorporated in the lease or tenancy. Where there is no express covenant in the lease or tenancy agreement², caveat emptor applies; the tenant assumes the risk and no liability attaches to the landlord³.

This common-law position derived from the single basic rural agricultural situation: a tenancy of agricultural land⁴. Though there might be some structures on the land, these were incidental to the main purpose of the transaction—the granting of agricultural land as a factor of production⁵. This traditional real property approach (deriving from a specific historical formation) was appropriate at a time when tenancies were primarily a means of securing the use of land—the land itself being used for producing profit.

This basis for justifying of the traditional real property rules is far

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1. Bottomley v. Bannister [1932] 1 K.B.458, per Scrutton L.J. at 468.
 2. It has been noted that most residential tenancies in urban Ghana are created orally and informally. There is no agreement on anything except the amount of rent and how it is to be paid. Judicial notice was taken of these facts by Sowah J.A., in Allamedine Bros. v. Paterson Zochouis [1971] 2 G.L.R.403, at 411.
 3. "A man who takes a house from a lessor, takes it as it stands; it is his business to make stipulations beforehand, and if he does not, he cannot say to the lessor, 'this house is not in a proper condition, and you . . must put it into a condition which makes it fit for my living in'"; per Romilly M.R., in Chappell v. Gregory (1863) 34 Beav.250, at 253. In England various exceptions have been introduced by the Housing Acts, 1957 and 1961.
 4. *supra*, pp.
 5. See Friedman, M.R., Friedman on Leases, op.cit., pp.1-10; Moskovitz, M., "The implied warranty of habitability—a new doctrine raising new issues", (1974) 62 Calif.L.R.1444; Quinn, T.M., & Phillips, E., "The law of landlord and tenant: a critical evaluation of the past with guidelines for the future", (1969) 28 Fordham L.R.38; Bennett, D.E., "The modern lease - an estate in land or a contract?", (1937) 16 Texas L.Rev.47.

removed from the socio-economic realities within which residential tenancies in urban Ghana operate. An American writer, commenting on the nature of the residential tenancy, noted:

"The contemporary urban tenant is primarily interested in the property for shelter rather than for profit . . ."¹.

The socio-economic conditions underpinning the common-law rule have been eroded, it behoves the legal scientist to consider whether it is (a) necessary; (b) desirable; and (c) possible for the law to imply a warranty of habitability in residential tenancies in urban Ghana?

The first question to consider is the housing situation in urban Ghana and the state of the private rental sector². There is an acute shortage of rental accommodation in Ghana—particularly in the urban areas. This is due to a number of factors including: (a) increase in population³; (b) migration⁴; and (c) the high cost of building which is the result of the lack of adequate planning, the shortage of building material⁵, and the high level of inflation⁶. The committee of enquiry set up to investigate the operation of the Rent Control Ordinance (No.2), 1952, had this to say in 1962:

"Though the various agencies of production in the public and private sectors are producing houses of various types, there is still a shortage of suitable accommodation, both in quantity and in quality, especially for the low and middle income groups"⁷.

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1. Cioffi, J., "The landlord-tenant relationship: a new urban structure", (1973) 18 New York L.F.725, at 733.
 2. *supra*, pp.47-56.
 3. *supra*, pp.42-45.
 4. *supra*, pp.43-45.
 5. There are frequent shortages of cement, roofing material, louvre glass, iron rods, nails, etc. Though the prices of these items are controlled, the items are seldom available at the controlled price. Most people buy these items at the Kalabule price, which, in some instances, is about five times the control price. For the failure of price control in Ghana; See Killick, T., "Price controls in Africa; the Ghanaian experience", (1973) 11 J.of.Mod. Afri.Stud.405.
 6. The rate of inflation accelerated from 22.8% in 1974 to 116% in 1979. See *infra* pp.363-366 for a fuller discussion of inflation.
 7. Report of the Committee, Accra, 1962, p. 9, para.4.

The demand for rental accommodation is far in excess of supply. In this situation, a landlord's market has been created. Given this imbalance between the supply of and demand for rented accommodation, the 'right' of a tenant to secure his interest by an express warranty ceases to be a practical proposition. Most tenants are compelled to take premises on the terms indicated by the landlord, without such a warranty.

In this concrete context, the maxim caveat emptor becomes particularly questionable; for when the bargaining positions of the parties are so unequal and alternative accommodation is virtually non-existent, a prospective tenant may well consider it prudent to be unaware.

The maxim caveat emptor is an essentially laissez faire doctrine. *It emanates from a historical formation which* stressed individual freedom and autonomy of the will¹. It may be well suited to situations where the concrete socio-economic realities make for more equal bargaining levers and where both parties can reasonably be expected to look after themselves. In urban Ghana, however, the landlord is in a superior bargaining position; he offers a scarce "commodity" and is operating in a "landlords' market" situation². The tenant, on the other hand, is either holding a tenancy which has expired or expires at about the time the new tenancy becomes effective; or he may be a first-time prospective tenant. In either of these situations he has not got much leverage. The laissez faire doctrine caveat emptor is grossly out of fit in a situation like this; the tenant, for all practical purposes, does not have the option of shopping around for available rental accommodation of his choice.

These concrete socio-economic facts would seem to argue for the need to imply a warranty of habitability in residential tenancies in urban Ghana. But these same realities argue for caution and circumspection³. Care must be

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1. See Williston, S., "Freedom of contract", (1921) Cornell L.Q. 365.
 2. See Date - Bah, S.K., "Legislative control of freedom of contract", in Essays in Ghanaian Law, (eds.) Ekow-Daniels, W.C. & Woodman, G.R., Accra, 1976.
 3. One of the fascinating insights of the study of law and society is that socio-economic factors which seem to cry out for legislative action severely limit the effectiveness of such 'regulation'. Thus, the imbalance between supply and demand (due to foreign exchange problems, etc.) in the non-socialised Ghanaian economy which led to price control legislation are partly responsible for the failure of such controls.

taken not to impose too onerous an obligation on the landlord¹. If this is done and the law is effective (this is most unlikely) the following consequences may emerge. Landlords unable to comply with the stringent requirements of the law may opt out of the rented residential sector altogether. It may also lead to rent increases which most of the urban poor will find difficult to pay. The consequences of implying a warranty of habitability in urban residential tenancies might worsen an already bad housing situation and lead to serious consequences².

II. Duty of maintenance and repair

a. Implied obligation

In general, the landlord is under no implied obligation to maintain the premises or to keep the premises in repair during the existence of the tenancy; only if he expressly covenants to do repairs is he liable for any repairs that become necessary³. Field research by the present writer indicated that in multi-dwelling premises tenants were not expected to carry out external repairs; the landlord took responsibility for it, but the actual repairs were either not done or done in their own good time. There were complaints about landlords failing to make repairs. The committee set up to enquire into the operation of the Rent Control Ordinance (No.2), 1952, noted similar complaints; but this was all it had to say in its report:

"Some of them, such as responsibility for repairs and decorations, are entirely matters of agreement between the parties"⁴.

The principal reason for this common-law position is historical, and lies in the peculiar nature of the leasehold interest as an estate in land⁵. The

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1. For an account of how the overweening ambition of legislators serves to limit the effectiveness of law: See Allott, A.N., The Limits of Law, London, 1980, pp.67-69.
 2. It is doubtful whether in the present economic and socio-political conditions of Ghana (including but not limited to the housing situation), implying a warranty of habitability in residential tenancies would have any practical effect: See *infra*, pp.334-368.
 3. Cannock v. Jones (1849) Ex.233; Coward v. Gregory (1866) L.R. 2 C.P. 153, at 172.
 4. Report of the Committee, Accra, 1962, p.18 , para.20 (e).
 5. *supra*, pp.64-69 .

traditional landlord-tenant relationship was primarily concerned with land. What ever structures were on the land were incidental to the main purpose of the transaction¹.

This quaint notion of residential tenancy as an estate in land is far removed from the realities of modern urban Ghana. The residential tenancy in modern urban conditions is a package of goods and services concerned primarily with shelter and other services like electricity, water, kitchen and lavatory facilities which make for a decent and comfortable living². Land is not an important consideration; and in most instances where a tenant rents a room or two, it is highly fictional to consider him as having an estate in land. The common-law rule may have been well-suited to the agrarian economy within which it developed, where the tenant-farmer was fully capable of making repairs to the simple structure himself. But it is archaic and out of fit with the realities of modern urban conditions where the tenant is most likely a salaried worker with a single specialised skill unrelated to the repair of premises³. Moreover, the buildings in urban Ghana are more complicated than the simple structures of mediaeval England—within which the foundations of landlord-tenant law were laid.

1. Placing the legal duty to repair on the landlord

It has been argued that the concrete socio-economic facts of urban Ghana have changed the factual assumptions on which the common-law rule is based. As a result of the changed social and economic circumstances residential tenants in urban Ghana, unlike their agrarian predecessors in mediaeval England, do not use their tenancies as a factor of production; nor do they have the ability or time to make repairs once easily made by the "jack-of-all-trades" tenant-farmer.

It may however be argued (by some) that when the concrete circumstances underpinning a particular transaction has changed and a rule is no longer

1. *supra*, pp. 64-69.

2. See *Javins v. First National Realty Corp.* 428F.2d.1071 (D.C.Coc.1970).

3. See Cioffi, J.J., "The landlord-tenant relationship: a new urban structure", *op.cit.*; LeSoff, H.H., "Landlord and tenant reform", (1960) 35 New York Univ. L.R.1279; Bennett, D.E., "The modern lease-an estate in land or a Contract?", (1937) 16 Texas L.Rev.47.

desiraole the parties are free to change it; and that the tenant can have a specific covenant inserted that imposed an obligation to repair on the landlord. This is the classic freedom of contract theory epitomised in the words of Sir George Jessel M.R.:

"If there is one thing which most than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice"¹.

This view, however, is not appropriate in the present housing situation. Residential tenancies are not the product of arms-length bargaining. Given the gross inequality in bargaining positions, most tenants—particularly low-income tenants—find themselves in a "take - it or leave - it" situation. Their lack of bargaining leverage in a strong landlords' market compels them to take premises on the landlord's terms. Secondly, and more importantly, most residential tenancies are entered into orally and informally, and apart from rent and the period of payment nothing else is agreed. Moreover, most tenants are not aware of these common-law rules and will therefore not seek to change them by express stipulation. The committee of enquiry into the operation of the Rent Control Ordinance (No.2), 1952, reported:

"There appears to be, however, some ignorance on the part of landlords and tenants as to their rights and obligations and a system by which landlords and tenants can be educated as to their duties and rights is clearly necessary"²

The following additional reasons would seem to argue for the duty of repair to be imposed on the landlord.

In the first place the value of the landlord's interest in the property

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1. Printing and Numerical Registering Co. v. Sampson (1875) L.R.19Eq. 462, at 465.
 2. Report of the Committee, Accra, 1962, p.19, Para.21.

is greater than the present interest of the tenant¹. The landlord will ultimately enjoy the benefit of any repair. Most residential tenants are monthly tenants and it is unreasonable to expect them to make repairs when there is no guarantee that they will continue to reside in the premises².

Society also has a responsibility to see to it that houses are not left unrepaired because of the deleterious social consequences which will follow from neglect³. Such state intervention may be thought by some to be a fetter on the freedom of contracting parties.

As has been argued, such freedom is already absent in most tenancy - situations. Society has an interest in seeing to it that houses are repaired and this cannot be left to individuals. Kessler and Sharp have noted that:

"In the evolution of the law of contracts, the basic assumption of the past that contract deals with the individual relations of man with each other has gradually given way to the recognition that in large sectors of our social and economic life contract is no longer an individual and private affair, but a social institution affecting more than the interests of the two contracting parties"⁴.

The Conveyancing Decree imposes an obligation on tenants to leave premises in repair⁵. It is not clear whether the legislature has made a deliberate policy-decision that repairing obligations are better placed on tenants. It is more likely that the legislator thinks that the landlord can do as he pleases

1. See Bradbrook, A.J., "The law relating to the residential landlord-tenant relationship: an initial study of the need for reform", (1974) 9 Melbourne Univ. Law Rev. 589.

2. The security of tenure provisions of the Rent Act, 1963 have been largely ineffective: See *infra*, pp. 306-333.

3. In the present economic conditions of Ghana state-aid for the repair of property is not a realistic option.

4. Kessler and Sharp, Contracts: Cases and Materials, Boston, 1953, p. 9, quoted in Date-Bah, S.K., "Legislative control of freedom of contract", *op. cit.*, p. 135.

5. Conveyancing Decree, 1973, s. 23 (1) and 3rd Sched., Pt. 1.

with his own property¹, but that the tenant should leave the premises in the condition in which it was when he entered. The implied statutory covenant to leave the premises in repair would not take care of major repair in multi-dwelling premises, nor does it ensure repair of the premises during the tenancy.

If society is to make sure that houses are repaired (and the society cannot help pay for the repair), it is arguable that the obligation should be placed on the landlord. As a general proposition, the landlord would be in a better position than the tenant to discharge this obligation. Most residential tenants rent only a room or two and it will be difficult to carry out repairs in separate but interdependent rooms in a house. The landlord who has an interest in the whole premises and has control of common areas like the roof, ceiling, bathroom and lavatory is in a better position to carry out the repairs².

But, again, a cautionary note must be sounded. For reasons some of which have already been canvassed, but the rest of which will be argued later, imposing a duty of repair on landlords may either make no difference or make things even more difficult for the tenants. The only real solution to the problems of tenants (lack of repair, absence of security and above-the-law rents) proved bargaining leverage for the tenant, and, perhaps more importantly (because without this the former cannot be achieved) an improvement in the social, economic and political circumstances of Ghana.

1. The Decree does not require the landlord to repair; nor does it require the tenant to keep the premises in repair.
2. It is not being suggested that landlords are a rich class; nor is it being suggested that most of them are "slum lords". Most of them are private individuals, some of whom live in the house. Most of them are not rich and, like most of the population, have been ravaged by inflation and the difficult economic^{situation}. They are not shylocks, just rational men reacting shrewdly to economic necessities. But, as a general proposition, their situation is better than that of most of their tenants: See Woodman, G.R., "Land law and the distribution of wealth", in Essays in Ghanaian law, op.cit., p 158, at 172-174. Furthermore, the landlord would be in a better position to secure financing for repairs while the tenant would be unlikely to get such financing because he has no long-term interest in the premises.

II. Common Areas and Parts of Premises in Possession of Landlord

The theory that a residential tenancy is a conveyance of an interest in land was easily applied to a tenancy of an entire property. There the landlord had no right to enter without the tenants permission, and he was held not to have a duty to repair. This theory is even more unsuitable when applied to tenancies of parts of premises to several different tenants who share entrances, lavatory, kitchen and bathroom facilities, and utility lines like water and electricity. With the latter, the tenants only have a right of non-exclusive use. The landlord retained control of these ancillaries, subject to the tenants' right of user.

In English law, it has therefore been held that the landlord is under an obligation to keep common areas and parts of premises in his control in a state of reasonable repair.¹ The issue of the responsibility for common areas and parts of premises was considered by the House of Lords in the English case of Liverpool City Council v. Irwin.² In this case, the lifts, rubbish chutes and lighting on the stairs of a tower block were not in good working condition. It was held that the landlord was in breach of an implied covenant to maintain these common parts in good working order. It has been suggested that the decision is not limited to tower blocks and that it applies equally to all multi-dwelling premises.³

1. See Cockburn v. Smith [1925] 2 K.B.795; Dunster v. Harris [1918] 2 K.B.795.

2. [1976] 2 W.L.R.562.

3. Woodfall, The Law of Landlord and Tenant, op.cit., Vol.I, 622.

b. Express Covenant

We have noted that generally there is no implied obligation on the landlord to repair. A landlord may, of course, agree to do all or part of the repairs during the term by an express covenant¹. Whatever he agrees to do in this respect should be inserted in the lease or tenancy agreement. Where a landlord undertakes some repairing obligations, a licence is implied in the tenancy giving the landlord the right to enter to repair the premises². Such a right is to be exercised reasonably.

1. Requirement of Notice

The common-law rule is that the liability of a landlord who covenants to repair does not arise until he has been given notice of the defective condition³. This rule was applied in Ghana in Nukpa v. Hunter⁴. In this case the landlord covenanted to make structural repairs to the premises. The tenant covenanted to keep the interior and exterior of the premises in repair. When the tenant defaulted, the landlord sued for recovery of possession. The tenant argued that the landlord had failed to make structural repairs; and that these should be done before distempering and papering — the repair in question. It was held that though structural repair should be done before decoration, the tenant should have informed the landlord of the structural defects. Since such notice had not been given the landlord was not liable. The law was thus stated by Coussey J.:

"Upon a covenant by the lessor to keep in good repair walls, drains and roofs of demised premises the lessor cannot be sued for non-repair unless he has received notice of non-repair"⁵

1. Of the 352 written tenancy agreements in the random survey of 2,000 only 10 contained express covenants by the landlord to repair.

2. Granada Theatres v. Freehold Investments [1959] 1 W.L.R.570.

3. Torrens v. Walker [1906] 2 Ch.166.

4. (1950) 1 C. (Land) 48-51, 253.

5. *ibid.*, p. 256.

The principle that a landlord's repairing covenant is a covenant to repair on notice is rationalised on the ground that without notice from the tenant, the landlord has no means of ascertaining the condition of the premises¹. As Coussey J., continued in Nukpa v. Hunter:

" . . . the lessor is not on the spot to see what repairs are wanting and therefore the lessee cannot accuse the lessor for breach of repairs without notice, for the lessor may not know that repairs are necessary"².

This is why the requirement of notice is unjustifiable where the landlord has been given licence to enter and inspect the premises³. It is suggested that in such cases the notice requirement be dispensed with⁴. The landlord has a very valuable interest in the premises and should take his inspection duties⁵ seriously. The renting of residential accommodation must be seen not merely in terms of rent-collecting, but as a service involving property management.⁶

Nor is it clear why the tenant should be expected to give notice when he has no way of knowing of the defective condition. In Hugall v. McLean,⁷ a landlord who has covenanted to repair a drain failed to do so. This resulted in the house flooding. The jury found that neither party knew of the defective condition of the drains; but that the tenant had not, while the landlord had, the means of knowing. The rule requiring notice was nevertheless followed¹. This is monstrous; there is no justifiable reason why a tenant

1. See Murphy v. Hurly [1922] 2 K.B.369.

2. *supra*, at p.256.

3. See Morgan v. Liverpool Corp [1927] 2 K.B.131; MaCarrick v. Liverpool Corp [1947] A.C.219. These cases hold that notice is required even where the landlord has a right to enter and view the premises.

4. See Reynolds, J.I., "Statutory covenants of fitness and repair", (1974) 37 M.L.R.377. The article deals with the English Housing Acts.

5. Under the current law inspection is not a duty; it is a privilege sometimes conferred by leases. It is suggested that a duty be imposed on landlords to make periodic inspections of residential property. For this the tenant should allow reasonable access and opportunity.

6. See Williams, G., (ed.) Law Reform Now, London, 1951, pp.113 and 124.

7. (1885) 53 L.T.94.

should have to give notice to the landlord of defects "of such a nature that the tenant did not know and could not have discovered by reasonable examination"¹. Such a rule is inequitable. Where the defects are obvious, at least one can say that the tenant should have brought it to the attention of the landlord. Where the defect is latent, no such blame attaches. One cannot be expected to give notice of defects which he cannot know about.

1. "Structural" repair

As was noted in Nukpa v. Hunter², when landlords undertake repairing obligations it is normally to make "structural" repair. A tenant may also covenant to do all repairs except those of a structural nature.

In Thome v. Barclays Bank Ltd.³ the meaning of "structural" was determined by the Court of Appeal. In this case the landlord leased his premises to a bank; part of the premises was to be used as a residence and the other part as a bank. The tenant covenanted to keep the premises in good and tenantable repair and condition. During the course of the tenancy the tenant carried out extensive alteration to the premises—converting the residential part of the premises into offices. The architect in charge of the alteration gave the following evidence:

"We did demolish certain iron load bearing, partition walls were demolished . . . We provided additional offices in the places not being used. We provided a new office for the manager to replace the existing manager's office which was located at a different position. We provided a new office for the assistant manager and typist . . . We took the walls of the previous office for the manager and added that to the banking hall A suspended ceiling was added

1. O'Brien v. Robinson [1973] 1 All E.R.583, per Diplock L.J. at 592.

2. (1950) D.C.(Land): 48-51, 253.

3. [1976] 2 G.L.R.126.

to the banking hall"¹

On the basis of this evidence, the trial judge held that there had been 'structural' alteration to the demised premises. On appeal, the ordinary bench of the Court of Appeal disagreed. Jiagge J.A., thought that to construe the evidence of the architect as an admission that there was 'structural' alteration would do violence to language². Archer J.A., said that the evidence of the architect showed that there was no alteration to the main structure of the building³. The ordinary bench gave a technical interpretation to the word 'structural'⁴, and relied on the definition of the architect, who said that:

"By structure I mean those components of the building that support it. After the alteration I would say the structure has not been affected"⁵.

On an application to the full bench, the decision of the ordinary bench was reversed. The full bench held that the word 'structural' should be given its ordinary meaning and not the technical meaning given to it by civil engineers. Azu - Crabbe J.S.C., delivering the unanimous judgment of the full bench had this to say:

"With great respect, it is unfortunate that the two learned judges should restrict themselves to the special meaning the architect gave the word Every part of the building is structure"⁶.

What then constitutes 'structural' repair? Surprisingly there is a paucity of authority on what constitutes 'structural' repair even in English law⁷.

1. *supra*, p.141-142.

2. [1973] 2 G.L.R.137, at p. 143.

3. *ibid*, at pp. 148.

4. *ibid*, Jiagge J.A. at p. 144; Archer J.A. at 149-150.

5. [1976] 2 G.L.R.126 at p. 141

6. *ibid*, pp. 142-143.

7. There is a lot more authority on 'structural' alteration, which was indeed what Thome v. Barclays Bank Ltd. was concerned with.

Vaisy J., defined 'structural repair' as meaning repairs of, or to a structure¹. Considering the definition of structure adopted by the full bench, this would mean that all repairs to premises apart from decorative work would be classified as 'structural repair'².

We suggest that the expression 'structural repair' should be used to distinguish repair which involves the essential structure of the premises — its walls, roof and foundation — from those which do not, such as repairing a broken window or door³.

3. Dependent and Independent Covenants.

We are here concerned with the relationship between a tenant's covenant to repair and a landlord's covenant to repair. Is the tenant's covenant to repair dependent upon the landlord performing his repairing obligations?

The first general principle is that it is a question of construction whether repairing covenants are absolute or conditional⁴. Being a question of construction, it is dependent on the intention of the parties to be ascertained from the words they have used and the circumstances in which they appear⁵. This being the case, decisions which have placed a particular meaning on a particular form of words or covenant are not to be taken as having decided that those covenants must always bear the same meaning⁶. This explains some apparently contradictory English decisions. In Cannock v. Jones⁷ where a tenant agreed to repair premises, the same "being previously put in repair and kept in repair" by the landlord, it was held that these words amounted to an absolute and independent covenant to repair and was not a condition

1. Granada Theatres v. Freehold Investment [1958] 1 W.L.R.845.

2. The definition of the full Bench is more satisfactory as regards 'structural' alteration with which the court was primarily concerned.

3. See W.A.West, Law of Dilapidations, 7th (ed.), 1974, Estates Gazette, p. 80-81

4. Westacott v. Hahn, op.cit., per Pickford L.J., at p. 505⁻, and Scrutton L.J., at p. 511; Holiday Fellowship v. Hereford [1959] 1 W.L.R. 211.

5. *ibid.*

6. *ibid.*

7. (1849) 3 Ex.233; (1850) 5 Ex.713.

precedent to the fulfilment of the tenant's repairing obligation. But in another case¹ where tenants agreed to keep premises in repair "the same being first put into repair" by the landlord, it was held that the landlord was under an obligation to put the premises in repair; and that until he had done this, he could not make the tenant liable for non-repair.

It is the same general rule which will apply in cases where the landlord undertakes to make structural repair; and the tenant other ~~rep~~ repair. In our view, this is the way in which the decision in Nukpa v. Hunter² should be considered. In this case the landlord covenanted to make structural repairs and the tenant covenanted to keep the interior and exterior of the premises in good, tenantable repair. The tenant failed to distemper and paint the premises and the landlord sued for recovery of possession. The tenant argued that the landlord had failed to do structural repairs which were necessary and that this should be done before distempering and painting. This submission was upheld by Coussey J., as being "perfectly reasonable"³.

This case should not be interpreted as having held that in every tenancy agreement in which the landlord undertakes to make structural repairs, the obligation of the tenant to keep the premises in repair is dependent on the landlord fulfilling his obligation. The nature of the repairs that the tenant has failed to do must be taken into account. There might not be much point in distempering and painting a house in want of structural repair. But the same cannot be said of, for example replacing a broken louvre pane or putting in a nail where it is needed, though, the premises are in want of structural repair⁴.

1. Neale v. Ratcliff (1850) 15 Q.B.916.

2. *op. cit.*

3. *op. cit.*, at p. 256. The landlord's right to re-enter was, however, upheld because the tenant had not given notice of the want of structural repair to the landlord.

4. By the Conveyancing Decree, 1973, S.31 (2), no damages or compensation is recoverable on breach of a covenant to put or leave premises in repair if imminent demolition or structural repair would render the repair.

4. Rights of tenant on breach

Where a landlord covenants to make repairs, there is no implied right that the tenant may quit the premises¹, or is not liable to pay rent², if the landlord fails to perform his obligations.

This is because, at common law, covenants in a tenancy agreement or lease have always been held to be independent³. The tenant's obligation to pay rent is therefore not dependent on the landlord performing his covenant to keep the premises in repair⁴. The landlord's only obligation is to deliver possession to the tenant. Once the tenant has possession, he is liable for rent. If the lack of repair is very serious and the tenant abandons the premises, he might rely on constructive eviction; otherwise his obligations continue⁵.

I. Damages

The tenant could, of course, bring an action for damages for breach of covenant⁶. In an action for damages for breach of covenant to repair during the course of a tenancy, it is unlikely that the tenant will be able to prove sufficiently large damages to warrant the time and expense of a law-suit.

A suit for damages is perhaps the least effective of the remedies, if one assumes that the primary goal is to improve the condition of the premises. The remedy is unpractical. This is because it does not result in building repair. Moreover, it does not commend itself to widespread use on account of the high expense, the irritation and the frustration of time - consuming legal proceedings, and the unavailability of legal aid⁷.

It is not a condition precedent to the tenant's right to recover damages

1. See Surplice v. Farnsworth (1844) 7 Man. & G.576.

2. See Hart v. Rogers [1916] 1 K.B.646, 651; Taylor v. Webb [1937] 2 K.B.283.

3. See *infra*, pp.214-217.

4. *ibid*.

5. See *infra*, pp.224-226.

6. In view of the legal expenses and the delay before cases are heard, this is hardly a practical remedy open to the tenant.

7. There is no legal aid scheme in Ghana.

for breach of the landlord's covenant that the tenant should actually have expended money in doing the repairs which the landlord ought to have done¹.

II. Repair and Deduct

There is an old English case which holds that the tenant may do the repairs and deduct the expense from the rent²; and there is a fairly recent case which would seem to suggest that this is still the law³. This remedy has been provided for by statute in some United States jurisdictions. Generally these statutes provide that the landlord of a building intended for human habitation must put it into a condition fit for such use, and repair all subsequent dilapidations not occasioned by the tenant's own negligence. If the lessor fails to make the repairs upon demand, the tenant may make them himself and deduct the cost from the rent.

If such a remedy exists under the common law or is provided for by statute, we suggest that it should not be made subject to contrary agreement.

III. Specific Performance

Specific performance of a covenant to repair should be a proper remedy for breach. In English law the courts have held that, in appropriate cases, the landlord's covenant to repair is specifically enforceable. In Jenne v. Queens Cross Properties⁴, Pennycuik V.C. made such an order. After distinguishing Hill v. Barclay⁵, he continued:

"There is nothing there at all inconsistent with a power in the court to make an order on a landlord to do specific work under a covenant to repair. I cannot myself see any reason in principle why, in an appropriate case, an order should not be made against a landlord to do some specific work pursuant to his covenant to repair"⁶.

1. Woodfall, Landlord and Tenant, op.cit., p. 614

2. Taylor v. Beal (1591) Cro.Eliz.222.

3. Lee - Parker v. Izzet [1971] 1 W.L.R.1688.

4. [1974] Ch.97.

5. (1810) 16 Ves.Jun.402, 405.

6. *supra*, at p. 100

This would appear to be the position in Ghana¹.

IV. Conclusion

In the present housing situation, care must be taken not to impose too onerous an obligation on the landlord. If this is done the tenant will be the one to suffer. A tenant who attempts to obtain improved housing conditions may be threatened with or face actual retaliatory measures. Such retaliatory action will take the form of increased rent or retaliatory eviction. As we would see later, rent control has been largely ineffective.

1. See C.F.A.O. v. Thome [1960] G.L.R.107 (discussed at p.208 infra). The case concerned a tenant's covenant to repair, but the observations of Apaloo J.S.C., will apply to a landlord's covenant.

B. THE OBLIGATIONS OF THE TENANTS

I. Implied Obligations

Unlike the landlord, who in the absence of an express covenant or statutory rule has no repairing obligations, the tenant is always under at least some responsibility to look after the premises he inhabits. In general, a tenant is not liable for injury to the premises resulting from reasonable and proper use, but is liable for injury beyond reasonable wear and tear, and for injury resulting from unauthorised use. At common law, this responsibility is expressed as: (a) a contractual duty to use the premises in a tenant-like manner and to deliver up possession to the landlord at the termination of the tenancy in a state of repair, fair wear and tear excepted; and (b) a duty not to commit waste. It must be pointed out that the responsibility of the tenant is not merely a passive duty of looking after the premises well, it is also an affirmative duty to make some repairs—repairs that are necessary to prevent waste and decay of the premises.

a. 'Tenant-like' User

A tenant is under an implied obligation to keep and deliver the premises in a tenant-like manner¹. But what does using premises in a tenant-like manner entail? In Warren v. Keen², Denning L.J., gave this answer:

"The tenant must take proper care of the place. He must, if he is going away for the winter turn off the water, and empty the boiler. He must clean the chimneys, when necessary, and also the windows. He must mend the electric light when it fuses. He must unstop the sink when it is blocked by his waste. In short he must do the little jobs about the place which a reasonable tenant would do"³.

1. Marsden v. Heyes [1927] 2 K.B.1; Thome v. Barclays Bank [1976] 2 G.L.R.126.

2. [1954] 1 Q.B.15.

3. *ibid*, at p.20

b. Waste

A tenant is under an implied duty not to commit waste. A tenant commits waste if he causes any alteration to the premises by way of damage, destruction, addition, improvement or neglect, which injures the reversion¹. Liability is founded in tort.

1. Types of Waste

Voluntary waste is committed by an act, actual or commissive, causing damage such as destroying, altering or converting the premises. Voluntary waste chiefly consists of deliberately pulling down premises or parts of premises. In Marsden v. Heyes², it was held that the tenant must deliver the premises in the same character in which they were granted to him. In Thome v. Barclays Bank³, where the tenant carried out extensive alterations to the premises—including converting the residential part of the premises into offices—the tenants were held to be in breach of their covenant to repair. But the court made it clear that the tenant would have been guilty of waste if there had been no covenant to repair⁴.

The question whether a particular piece of alteration or conversion, or pulling down a particular door or window constitutes waste, is one of fact and of degree. In Hyman v. Rose, Buckley L.J., said in the Court of Appeal:

"whether opening a door in a wall is a breach of a covenant to maintain the wall or is waste is to my mind largely a matter of degree"⁵.

1. Burrows v. Crutcher Steel Co. [1925] 1 K.B.119.

2. [1927] 2 K.B.1.

3. [1976] 2 G.L.R.126.

4. *ibid*, at p.139. The court quoted approvingly this statement of Buckley L.J., in Rose v. Hyman [1911] 2 K.B.234 at p.253:

"As regards any alteration of the structure the matter must be regarded from two aspects - first, upon the covenants of the lease, and, secondly, upon the doctrine of waste. It would be waste to make such alterations as to change the nature of the thing demised".

5. [1911] 2 K.B.234, at p.255.

and in the House of Lords, Lord Lora-burn L.C., had this to say:

"I cannot assent to the argument that a lessee with a covenant such as this can under no circumstances make a new door, or that doing so necessarily amounts to waste"¹.

Furthermore, in considering whether the particular acts of a tenant constitute waste, regard must be had to changing socio-economic conditions. Nineteenth - century English decisions need not necessarily be followed².

Permissive waste is distinguishable from voluntary waste in that the damage caused results from negligence and omission to maintain or repair such as by allowing a wall to deteriorate and eventually collapse, or a house to fall into ruins, or a fire to spread.

2. Liability for waste

A tenant for a fixed term has since 1267 been held liable for both voluntary and permissive waste³. This means that if the terms of the tenancy make no provision for repair the tenant is liable for waste and must maintain and deliver the premises in the condition in which he took it⁴.

A periodic tenant is liable for voluntary waste but not for permissive waste as such⁵. He was said to be liable, however, to keep the premises wind and water - tight⁶. But this is questionable⁷. It would seem that the extent of the liability of a periodic tenant will depend on the length of the 'period', and that he will not be liable for mere wear and tear of the premises⁸.

3. Conveyancing Decree, 1973

As has been seen⁹, a tenant, by the Conveyancing Decree, 1973, impliedly covenants not to make alterations or additions to the premises or to cause or permit injury to its walls¹⁰. The tenant further covenants that:

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1. [1912] A.C.623, at 632.
 2. See Barclays Bank v. Thome [1973] 2 G.L.R.137, per Archer J.A., at 150.
 3. Statute of Marlbridge (52 Hen. 3); Yellowly v. Gower (1855) 11 Ex.274.
 4. Marsden v. Heyes, op.cit.
 5. Toriano v. Young (1833) 2 C. & P.8.
 6. Answorth v. Johnson (1832) 2 C. & P.239; Wedd v. Porter [1916] 2 K.B.97.
 7. Warren v. Keen [1954] 1 Q.B.15; Regis Property Co.Ltd. v. Dudley [1959] A.C.370

"At the determination of the term of the lease to yield up to the covenantee the premises leased and all additions thereto and covenantee's fixtures therein in good and tenantable repair"¹.

The combined effect of these provisions is to make much of the common law of waste redundant. But the law of waste will still apply to residential tenancies created before the commencement of the Conveyancing Decree². As regards tenancies created after 1st January, 1974, however, the provisions of the Decree will apply to 'cases' hitherto governed by the law of waste.

II. Express covenant to repair

It is normal for well-drawn leases to contain express covenants imposing repairing obligations on tenants³.

a. Contractual nature of the covenant

An obligation to repair must be founded upon privity of contract⁴. But the covenant must be considered in relation to the grant of the tenancy. The tenant is not liable for breaches of the covenant committed before the execution of the lease, even if the breach is subsequent to the day which the lease or tenancy agreement stipulates for commencement of the tenancy. In Chidiak v, Coker⁵, a tenant sub-let and delivered possession to the sub-tenant before obtaining the consent of the governor. The consent of the governor was required because it was state land. The premises were damaged by fire before the consent of the governor could be obtained. It was held that the sub-tenant is not liable on his covenant to repair. Cussey J.A., said:

" . . . the execution of the lease by the lessor is a condition precedent to the lessee becoming liable on the covenant"⁶.

8. Toriano v. Young, supra; Warren v. Keen, supra.

9. supra, pp.139-140.

10. S.23 (1) and 3rd Sched., Pt.I.

1. Conveyancing Decree, 1973, S.23 (1) and 3rd Sched; Pt.I.

2. By section 46 the Decree came into force on 1st January, 1974.

3. Of the 352 written tenancy agreements in the survey 276 (about 70%) contained covenants to repair by tenants. All the 133 properly-drawn leases contained covenants to repair by tenants.

4. Ramage v. Womack [1900] 1 Q.B.116.

5. (1954) 14 W.A.C.A.506.

6. *ibid.*, at 508.

b. Construction of covenants to repair

Covenants are to be construed according to the words used, and the context of each particular case. Decisions upon the meaning of particular expressions give valuable guidance, but are not to be applied blindly to the facts of another case¹.

1. "To put in repair"

Except where the premises to be let are in a serious state of disrepair it is comparatively rare for a tenant to covenant that he will put them into repair at the beginning of the tenancy². One of the few decided cases in which there is such a covenant is Sackey v. Ashong³. In this case, the premises were in a "very dilapidated condition" when negotiations for a lease took place. The prospective tenant agreed to put the premises into repair, and this he did. C.F.A.O. v. Thome⁴ is another example. The premises were in a state of disrepair at the time of letting. The tenant agreed to put the premises into repair and to spend for this purpose a sum of £ G 500 (¢ ?).

2. "TO keep in repair"

A tenant who has covenanted to keep premises in repair must have them in repair at all times during the course of the tenancy. If the premises are at any time out of repair, he commits a breach⁵. A covenant to keep premises in repair requires the tenant to put the premises into repair at the beginning of the tenancy, if necessary. The tenant is obliged to keep the premises in repair throughout the tenancy and he cannot keep in repair until he has first put the premises in repair⁶.

3. "To leave in repair"

A covenant by the tenant to "keep in repair" is commonly coupled with a covenant to "leave in repair". But this is not necessary since to "keep in repair" requires the tenant to leave in repair. In some cases, however,

1. See Calthorpe v. McOscar [1924] 1 K.B.716, per Atkin L.J., at 731

2. Of the 276 tenants in the survey of 2,000 who undertook some repairing obligation, only 2 covenanted to put in repair.

3. (1956) 1 W.A.L.R.108.

4. [1966] 1 G.L.R.107

5. See Luxmore v. Robson (1818) 1 B & Ald.584.

(F.N.6.p.t.o.)

a covenant to "leave in repair" is the only covenant on repair¹. In such cases no liability can arise until the end of the tenancy—the obligation being to deliver the premises at the end of the tenancy in a state of repair. In C.F.A.O. v. Thome², the terms of the tenancy were agreed upon orally. The tenant covenanted that "at the expiration of the tenancy, the premises to be handed over in good and tenantable condition". At the end of the tenancy the tenant could not deliver the premises to the landlord because they were not in good and tenantable condition. When after some^time the necessary repairs had not been done, the landlord sued for recovery of possession of the premises in a state of repair. It was held that the tenant was in breach of his covenant and was therefore liable for damages³.

c. Extent of repairing obligation

1. Standard of repair

In Anthruther - Calthorpe v. McOscar⁴, Scrutton L.J., saw no difference in meaning between "repair", "good repair", "sufficient repair" or "tenantable repair". Unless some special or unusual expression is employed these terms mean the same thing.

This does not, however, imply that the standard of repair in any tenancy in which either of these terms is used is the same. Such factors as the duration of the tenancy and the particular circumstances of each tenancy will affect the standard of repair to be imposed. That the standard of repair is relative was laid down in Proudfoot v. Hart⁵. In a case involving a tenancy for three years, Lord Esher M.R., defined good and tenantable repair as being:

" ' . . . such repair as having regard to the age, character and locality of the house would make it reasonably fit for the occupation of a reasonably - minded tenant of the class likely to take it'. The age of the house must be taken

6. See Payne v. Haine (1847) 16 M. & W.541.

1. By the Conveyancing Decree, 1973, S.23 (1), a covenant to leave premises in repair is implied in all residential tenancies for valuable consideration.

2. [1966] 1 G.L.R.107.

3. The specific performance aspect of this case is discussed below, at pp.208-209.

4. [1924] 1 K.B.716.

5. (1890) 25 Q.B.242; applied in Jaquin v. Holland [1960] 1 W.L.R.258.

into account because nobody could reasonably expect that a house 200 years old should be in the same condition of repair as a house lately built; the character of the house must be taken into account, because the same class or repairs as would be necessary to a palace would be wholly unnecessary to a cottage; and the locality of the house must be taken into account, because the state of repair necessary for a house in Grosvenor Square (a richer quarter) would be wholly different from the state of repair necessary for a house in Spitalfields (a poorer quarter). The house need not be put into the same condition as when the tenant took it; it need not be put into perfect repair; it need only be put into such a state of repair as renders it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it"¹.

The decision in Proudfoot v. Hart was wholeheartedly endorsed and applied in Ashley v. James Colledge². In this case the tenant covenanted to keep the interior of premises in "tenantable order and sanitary condition", fair wear and tear excepted. He further covenanted that at the end or sooner determination of the tenancy he would yield up the premises in good and tenantable repair and condition. Glass and louvred windows were damaged during the course of the tenancy. On the expiry of the tenancy the landlord sued for breach of the covenants to repair. Tenant denied that the premises were in a state of disrepair and argued that his obligation did not extend to "re-decorating the entire internal walls" as the landlord had requested during the tenancy.

After approvingly quoting from Lord Esher's judgment in Proudfoot v. Hart, Adumua-Bossman J., said:

" . . . the defendants obligations under the two covenants . . . were to keep, or maintain the interior only of the demised premises in such condition that no reasonably - minded tenant of the class who obtains leases of premises

1. op.cit., at 52-53.

2. [1961] 1 G.L.R.469.

in the locality, confind the premises, the subject-matter of this action, such that he can honestly condemn it as unfit for habitation and in that condition, to surrender or yield up possession to the plaintiff"¹.

Applying this statement of the law to the facts before him, the learned judge held that:

" . . . the damage to the glass and louvred windows, having been caused, . . . by inherent defects in their construction the defendents cannot be liable for that damage . . . In any event I do not believe that the damages were of such a nature as to make any reasonably-minded person who would desire to be a tenant of the class of premises avoid or shun the house as unfit for habitation"².

As regards internal decoration, the learned judge held that the covenant to repair did not extend to decoration³.

Where the character of the neighbourhood has changed during the course of the tenancy, the standard to be attained is that prevailing at the time when the covenant was entered into; for those were the conditions within the contemplation of the parties⁴.

The age of the house is also material, though only in the sense that the tenant's obligation requires him only to keep up the house as an old house and not give back a new one to the landlord. The tenants obligation is to keep the premises in reasonably good condition considering its age. The question of fact which the court has to decide is whether the tenants have, in the words of Tindal C.J.:

" . . . done what was reasonably to be expected of them, looking at the age of the premises on the one hand, and the words of the covenant which they have chosen to enter into, on the other"⁵.

1. op.cit., 473-474.

2. [1961] 1 G.L.R.469, 474.

3. Unfortunately, the report does not indicate the locality and the town in which the premises were situated; nor the duration of the tenancy.

4. Anthruster-Calthorpe v. McOscar 1924 1 K.B.716.

5. Gutteridge v. Munyard (1834) 1 M. & Rob.334, 337

2. Repair vrs. renewal

The operation of time and the elements will, in the course of time, result in damage to premises which could only be remedied by building a new house. This the tenant is not obliged to do. But he must undertake all repairs necessary to protect against damage caused by the elements. The tenant's duty is to repair and this does not extend to rebuilding the whole premises. But repair involves the replacement of subsidiary parts. "Repair", said Lord Atkin ⁱⁿ Calthorpe v. McOscar, "connotes the idea of making good damages so as to leave the subject as far as possible as though it had not been damaged. It involves renewal of subsidiary parts; it does not involve renewal of the whole"¹.

Renewal, as distinguished from repair, "is construction of the entirety"². But this distinction is not always clear and in one English case it was held that the repairing covenant extended to *piecemeal repair of parts culminating in a complete renewal!*³

The *right distinction* would therefore seem to be between repair and reconstruction⁴. The former is required, the latter not. Whether work necessary for maintenance is repair or reconstruction is a question of degree. The test to be applied is whether the *repair* involves only a renewal of *some* parts; or whether it involves reconstruction of a *large portion* of the subject-matter of the covenant. The latter is not covered by a repairing covenant. The tenant is not required to give back something different in kind from what he took⁵. In the English case of Lister v. Lane⁶, the tenant of a house (at least 100 years old) covenanted to "well, sufficiently and substantially repair, uphold, sustain, maintain, amend and keep" the demised premises and yield them up in that condition at the end of the term. The house was built on a timber platform. Owing to the timber rotting, the foundation sank. It was held that the tenant was not liable on his repairing covenant to replace the foundation with one of an entirely different character.

1. op.cit., at 734.

2. Lurcott v. Wakeley [1911] 1 K.B.905, per Buckley L.J., at 924.

3. ibid., per Fletcher-Moulton L.J., at 916-917.

Lord Esher.M.R., stated that:

"However large the words of the covenant may be, a covenant to repair a house is not a covenant to give a different thing from that which the tenant took when he entered into the covenant. He has to repair the thing which he took; he is not obliged to make a new and different thing"¹

This does not, however, imply that the covenant will never require a tenant to do work which will constitute an improvement to the premises. It was noted², that in Ashley v. James Colledge³, Adumua-Bossman J., had held that the repairing covenant does not require a tenant to remedy inherent defect⁴. For this proposition the learned judge relied on a statement by Lord Esher M.R., in Lister v. Lane, that:

" . . . if a tenant takes a house which is of such a kind that by its own inherent nature it will in the course of time fall into a particular condition, the effects of that result are not within the tenant's covenant"⁵.

With respect, this is too sweeping a statement of the law. The mere fact that a renewal of some part is rendered necessary as a result of an inherent defect does not (as the English law stands at the moment) prevent the renewal from being within a repairing covenant⁶. The renewal is outside the repairing obligation only if, in addition to it being necessitated by an inherent defect, it would result in the introduction of something different from the premises granted⁷.

4. See Cheshire, G.C., Modern Law of Real Property, London, 1976, p. 416.

5. Brew Bros. v. Snax (Ross) [1970] 1 Q.B.612.

6. [1893] 2 Q.B.212.

1. op.cit., at 216-217. The statement of Lord Esher was quoted approvingly by Azu-Crabbe J.S.C., in Thome v. Barclays Bank [1976] 2 G.L.R.126,133.

2. *supra*, p. 163.

3. [1961] 1 G.L.R.469.

4. *ibid.*, at 474.

5. [1893] 2 Q.B.212, 216.

6. Lurcott v. Wakeley [1911] 1 K.B.905; Brew Bros v. Snax (Ross) [1970] 1 Q.B.612; Ravenselft Props. v. Davstone Holdings [1979] 2 W.L.R.878.

7. *ibid.* Preference is not being expressed for the present English-law position.

The question whether the repair would result in the introduction of something different in kind from the premises granted, is a question of degree. The tribunal of fact should:

" . . . look at the particular building, to look at the state which it is in at the date of the lease, look at the precise terms of the lease, and then to come to a conclusion as to whether on a fair interpretation of those terms in relation to that state, the requisite work can be fairly termed repair"¹.

3. Obligation to repair implies duty not to destroy

A Covenant to repair raises a duty not to destroy the premises. When during the course of argument in Gange v. Lockwood², it was contended for the tenants that the opening of doors in the wall was not a breach of the covenant to repair, Willes J., interposed this remark:

"Pulling down the building to be kept in repair is a breach of the covenant to repair"³.

Later, in his direction to the jury, the learned judge elaborated on this statement:

"As to the first breach I have already said that a covenant to repair, uphold and maintain or keep in good repair, raises a duty not to destroy the demised premises and pulling them down, wholly or partly, is a breach of such covenant"⁴.

Alterations which change the nature and character of the premises are generally a breach of the covenant to repair⁵. In Thome v. Barclays Bank⁶, it will be recalled that the tenants carried out extensive alterations to the premises, including converting the residential part of the premises into offices, despite covenanting to keep the premises in repair. This was held to be a breach. It must not, however, be supposed that every alteration to

1. Brew Bros. v. Snax (Ross) [1970] 1 Q.B.612, per Sachs L.J. at 640.

2. (1860) F & F 115.

3. *ibid.*, 117.

4. *ibid.*, 117.

5. Marsden v. Heyes [1927] 2 K.B.1. 6. [1976] 1 G.L.R.126.

the premises which involves pulling down a subsidiary part, is necessarily a breach of the covenant to repair. The test to be applied is:

"Is what has happened of such a nature that it can fairly be said that the character of the subject-matter of the demise, or part of the demise in question has been changed"¹.

The question is one of fact to be determined on the circumstances of each case. Reasonable alterations, compatible with any permitted user of the premises does not constitute a breach². The question whether a particular act constitutes a breach of covenant being one of fact, regard must be had to the changed and changing circumstances of Ghana, and old English decisions should not be followed blindly. As was pointed out by Archer J.A in

Barclays Bank v. Thome:

"It seems to me that to some extent the nineteenth century judicial precedents should be relied on with caution. Each case must be viewed in the light of all relevant facts. It is unconvincing to argue that because in 1817 an English court held that pulling down a wall constituted a breach of a covenant to repair therefore in 1973, whenever any tenant pulls down a wall he must necessarily be in breach of a covenant to repair . . . these cases belong to a different age. We live in the twentieth century . . . whether an alteration has affected the structure of a building must be viewed in the light of prevailing factors in a present age"³

At common law an alteration which constitutes an improvement and does not affect the structure of the premises is not prohibited by a covenant to repair. In Ampiah v. G.B.Ollivant⁴, the tenants covenanted to keep the

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1. Lurcott v. Wakeley [1911] 1 K.B.905, per Cozens-Hardy M.R. at p. 914.
 2. Thome v. Barclays Bank [1976] 2 G.L.R.126, per Azu-Crabbe J.S.C. at p. 140.
 3. [1973] 2 G.L.R.137 at p. 150. This was in the judgment of the Ordinary Bench which was reversed by the full Bench. But the full Bench did not overrule this statement; and we think it is eminently sensible.
 4. (1948) D.C.(Land) 51, 46.

interior of the premises in good and tenantable repair and condition. During the tenancy, the tenants converted an opening into two doors, and two windows. When the landlord sued for recovery of possession it was held that these alterations were improvements; and therefore that the tenants were not in breach of their repairing covenant.

The Conveyancing Decree, 1973 has impliedly overruled some of these common-law decisions¹. By section 23 (1) a tenant impliedly covenants not to make any alterations or additions to the premises without the written consent of the landlord; he also covenants not to cause or permit injury to walls. Thus, with the coming into force of the Decree², questions like whether the alterations constitute an improvement³, or change the nature and character of the property⁴, are no longer relevant. The tenant will be liable if he makes any alteration or addition, or causes or permits injury to the walls of the premises.

4. "Fair wear and tear excepted".

The obligation to repair is often qualified by a rider exempting the tenant from liability for "fair wear and tear", or words to that effect. The effect of this disclaimer is to relieve the tenant from liability for damage caused by both the normal action of time and the elements, and by normal and reasonable use of the premises for the purposes for which they were let.⁶ The effect of a repairing covenant containing an exception for reasonable wear and tear, was stated by Tindal C.J. thus⁵:

"What the natural operation of time flowing on effects, and all that the elements bring about in diminishing value, constitute a loss which, so far as it results from time and nature, falls upon the landlord".

1. *supra*, pp. 139-140, 192-194.

2. 1st January, 1974.

3. Ampiah v. G.B. Ollivant, *supra*.

4. Thorne v. Barclays Bank, *op. cit.*

5. Gutteridge v. Munyard (1834) 1 Moo & R 244.

6. Cheshire, G. C., Modern Law of Real Property, *op. cit.*, p. 416.

A " fair wear and tear " exception will, though exempting liability for repair occasioned by the normal operation of time and the elements, will not cover repair occasioned by abnormal or extraordinary phenomena.¹

In English law, it has been held that a fair wear and tear exception does not exempt the tenant from consequential damage. The tenant is supposed to prevent any further damage which may ensue as a result of damage caused by time and the elements. The English-law position was enunciated by Talbot J. in a statement later adopted by the House of Lords². Ruling on the effect of a fair wear and tear exception, the learned judge said:

" If any want of repairs is alleged and proved in fact, it lies on the tenant to show that it comes within the exception. Reasonable wear and tear means the reasonable use of the house by the tenant and the ordinary operation of natural forces. The exception of want of repair due to wear and tear, *reasonable conduct on the part of the tenant being* ~~rea-~~ *must be construed as limited to what is directly due to wear and tear* assumed. It does not mean that if there is repair originally proceeding from reasonable wear and tear the tenant is relieved from his obligation to keep in good repair and condition everything which it may be possible to trace ultimately to that defect. The tenant is bound to do such repairs as may be required to prevent the consequences originally flowing from wear and tear from producing others."

1. Manchester Bonded Warehouse v. Carr (1880) 5 C.P.D.507.

2. Hesketh v. Marlow 1928 2 K.B.45,58-59, approved by the House of Lords in Regis Prop.Co. v. Dudley 1959 A.C.370.

This rule on consequential damage was rejected by the English Court of Appeal in Taylor v. Webb²; but was restored¹ by the Court of Appeal in Brown v. Davies³ and finally affirmed by the House of Lords in Regis Property Co. v. Dudley⁴. Discussing the position in that case, Lord Denning said:

"I have never understood that in the ordinary house a fair wear and tear exception reduced the burden of repairs to practically nothing. It exempts a tenant from repairs that are decorative and for remedying parts that wear or come adrift in the course of reasonable use, but it does not exempt him from anything else. If further damage is likely to flow, from the wear and tear he must do such repairs as are necessary to stop that further damage. If the slate falls through the roof through wear and tear and in consequence the roof is likely to let through water, the tenant is not responsible for the slate coming off but he ought to put in another one to prevent further damage"⁵

With respect, this is too sweeping as a statement of principle. It demonstrates again the bias of the common law in favour of the landlord; and imposes on the tenant an obligation which has been expressly excepted. It also excuses somebody, presumably the landlord, from obligations which fall on him. Nor

2. [1937] 2 K.B.283.

3. [1958] 1 Q.B.117.

4. [1958] 3 All E.R.491.

5. *ibid.*, at pp. 511-512

do the statements of Talbot J., and Denning L.J. explore all the fact-situations that can occur. In the particular example of the fallen slate, if the tenant is excused from damage due to wear and tear, then the responsibility must fall on somebody else, presumably the landlord. In such circumstances, if the landlord knows of the defect—as a result of having been informed by the tenant or through carrying out inspection of the premises¹—it is not at all clear why the tenant should be responsible for any consequential damage. The liability for repairing damage caused by wear and tear does not lie on the tenant; and the landlord has a valuable interest in the property, if he willingly and knowingly suffers the damage to go unrepaired and consequential damage ensues, the responsibility must be his.

It is thus proposed that the rule on consequential damage should not be followed in Ghana. In all cases where a tenant's covenant to repair contains an exception for fair wear and tear, society must impose an obligation on the landlord to be responsible for such repair. If the landlord willingly suffers the damage to go unrepaired and consequential damage ensues he should be responsible. The tenant should be under an obligation to inform the landlord of such damage. When the landlord inspects the premises or is due to inspect them, however, this notice ceases to be necessary.

1. It has been argued that landlords should be under an obligation to carry out regular inspection of premises; see, ante pp. 183-184.

d. Remedies for Non-Repair

1. Damages

Where the tenant is in breach of his covenant to repair, the landlord can sue for damages. In a landlord's action for non-repair, the measure of damages is the amount by which the reversion is depreciated in marketable value by the want of repair. By section 31 (1) of the Conveyancing Decree, 1973, "damages for breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant or agreement is expressed or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to that breach"¹.

It must be noted that this section provides only an upper limit; it does not alter the method of assessing damages². In Ghanaian law it has been held that in appropriate circumstances the amount which has been or would have to be spent on putting the premises into the state to which they should have been put by the tenant, is prima facie the recoverable amount of damages. In C.F.A.O. v. Thome³ a tenant who had covenanted to put the premises in repair and at the termination of the tenancy to yield up the premises in a state of repair, failed to make the necessary repair. At the expiration of the tenancy he could not deliver possession to the landlord because the premises were in a state of non-repair. By agreement, the parties obtained the advice of an expert who assessed the cost of repairs to be done on the flats at £ G 2,367 10s. The tenants still failing to make the repairs, the landlord sued for recovery of possession of the flats in a state of repair. In awarding damages to the landlord, Apaloo, J.S.C., delivering the judgement of the Supreme Court, stated the law thus:

1. This is a verbatim reproduction of section 18 (1) of the English Landlord and Tenant Act, 1927.

2. Hanson v. Newmann [1934] Ch.298.

3. [1966] 1 G.L.R.107.

"What is the measure of damages to which the plaintiff is entitled? In my judgment, it is such sum of money as would put the plaintiff in the same position as if the repairs had been carried out by the company—tenants . In other words, the plaintiff is entitled to receive from the company the cost of repairs by way of damages . . . I consider therefore that had the company carried out the repairs as they were obliged to do, they would in 1961, have spent the sum of £ G 2,367 10s, in carrying it out. The sum ought, *prima facie*, to be the damages to which the plaintiff is entitled"¹.

Apaloo J.S.C., then took judicial notice of inflation²—the case was decided in 1966 — and awarded damages of £ G 2,500 to the landlord.

By section 31 (2) of the Conveyancing Decree, 1973, however, no damages or compensation is recoverable for breach of a covenant to put or leave premises in repair if it is shown that imminent demolition or structural repair, on the termination of the tenancy, would render the repair covered by the covenant valueless.

The landlord is not bound to use the money recovered as damages in repairing the premises³.

2. Specific Performance

The tenant's covenant is normally not specifically enforceable. This has been the common law rule since Hill v. Barclay⁴ was decided in 1810. We noted that in C.F.A.O. v. Thome, the landlord sued for recovery of the flats in a state of repair. This was ordered by the trial judge. On appeal, the Supreme Court held that the trial judge ought not to have ordered the tenants to deliver the premises in a state of repair as that order was

1. *op.cit.*, at p.118

2. *ibid.*

3. Doe d. Worcester School Trustees v. Rowlands (1841) 9 C. & P.734.

4. (1810) 16 Ves. Jun. 402.

tantamount to decreeing specific performance. Apaloo J.S.C., delivering the judgment of the Supreme Court, said:

"Like all other equitable remedies, specific performance was discretionary and ought not to be granted where the injury complained of could be adequately compensated in damages. An order of specific performance would, on the facts of this case, be difficult of enforcement"¹.

It is important to note that the Supreme Court did not rule that a covenant to repair is not specifically enforceable. In this respect, the Supreme Court departed from the rule laid down in Hill v. Barclay². It is submitted that the approach of the Supreme Court is the better one. It offers more flexibility—each case being decided on its facts. In appropriate cases therefore, where the repair involved is simple and straightforward, specific performance should be available.

3. Re-entry³

Where a covenant to repair is fortified by a proviso for re-entry consequent on its breach, then breach of the covenant will result in forfeiture. But it must be emphasised that forfeiture will result only if the covenant to repair is buttressed by a forfeiture clause⁴.

1. op.cit., at p.117

2. The Supreme Court did not even cite Hill v. Barclay. The decision of Apaloo J.S.C. shows that the Supreme Court relied on the general principles governing the granting of specific performance.

3. This is more fully discussed in a later chapter when the termination of tenancies is considered: See *infra*, pp.292-305.

4. Ampiah v. G.B.Ollivant op.cit.; Sackey v. Ashong, op.cit.

e. Destruction of the Premises

At common law, a tenant who covenants to repair the premises during the currency of the tenancy, must rebuild the premises if accidentally destroyed by fire, storm or earthquake¹. He continues liable for rent despite the destruction². The landlord is under no implied duty to rebuild the premises³. Nor is it material that the landlord has received proceeds of insurance, if he had procured the insurance in his own name and at his own expense⁴. It would appear that even in cases where the tenant's covenant expressly ousts liability where the premises are destroyed, this does not impose an obligation upon the landlord to restore the premises⁵. The landlord is liable only when he expressly covenants that he will restore destroyed premises.

This common-law position is the result of the common law regarding residential tenancies as coveyances which create an estate in land. The tenant was deemed to have an interest in the land—something which remained usable despite destruction of the improvements. The common-law rule may not have been inappropriate in the circumstances in which it developed—an agrarian economy where farm buildings were easily replaceable and were in most cases incidental to the main purpose of the grant. But it does not justify the failure of the legislature and the courts to formulate new rules to govern residential tenancies, thus restricting the common-law rules to their proper domain. We would suggest that where premises, the subject-matter of a residential tenancy, is destroyed the tenancy should be held to be at an end, the purpose of the tenancy having been frustrated⁶.

The common law's failure to take into account proceeds of insurance also demonstrates the failure of the law affecting residential tenancies to

1. Bullock v. Dommitt (1796) 2 Chit.608; Clarke v. Glassgow Assurance (1854) 1 Macq. (H. of L.) 668; Redmond v. Dainton [1920] 2 K.B.256.

2. This issue is discussed in the next chapter when the obligation to pay rent is considered: See *infra*, pp.213-216.

3. Weigall v. Waters (1795) 6 T.R.488.
(F.N.4.5.6. p.t.o.)

rid itself of its medieval origins. At that time there was no insurance available, at least not as we know it today. But it is now very difficult to understand why a tenant should be responsible for restoring premises after the landlord has received insurance money in connection with the self-same premises.

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4. Leeds v. Chattam (1827) 1 Sim 146; Lofft v. Dennis (1859) 1 E & E 474.
 5. Weigall v. Waters (1795) 6 T.R.488.
 6. The question of frustration in tenancies is discussed later: See *infra*, pp.289-292.

CHAPTER SIXRENT

" . . . the principles of law laid down by the Judges in the 19th century—however suited to social conditions of that time—are not suited to the social necessities and social opinion of the 20th century. They should be moulded and shaped to meet the needs and opinions of today"¹.

Introduction

At common law, 'rent' has a specialised meaning. It has been defined as:

" . . . a certain profit issuing yearly out of land and tenements corporeal; and may be regarded as of a two-fold nature; first as something issuing out of land, as compensation for possession during the term; and secondly, as an acknowledgement made to the lord of his fealty or tenure"².

Following the common law, the Conveyancing Decree, 1973,³ defines rent as:

" . . . any periodical payment in money or money's worth reserved or issued out of or charged upon land"⁴.

It is clear from these definitions that at law rent is not simply consideration paid by the tenant in return for the right to occupy premises and be provided with certain services. The landlord/tenant relationship is seen as a tenurial relationship, and rent as an incident of tenure. This is so regardless of whether the tenancy is one of agricultural land or residential premises in urban communities⁵.

The legal concept of rent—and the rules governing the obligation to pay rent—reflect quite plainly the historical origins of the landlord/tenant relationship and the particular socio-political formation within which the foundations of the common law were laid⁶. Originally rent was a form of

1. The Rt.Hon.Lord Denning M.R., The Discipline of Law, London, 1979, Preface, p.v.

2. Woodfall, Law of Landlord and Tenant, London, 1978, Vol.1, p.276.

3. N.R.C.D.175.

4. *ibid.*, S.45 (1).

5. The consequences and absurdities of this conception are examined throughout the thesis.

6. *supra*, pp. 64-69.

feudal service owed by the tenant to his landlord. It was regarded as a tribute or return to the landlord of a portion of the actual or possible profits accruing from the land. Rent was some form of proprietary interest. It:

" . . . must by being attached to visible land be given something approaching the character demanded by the remedies of distraint and real actions"¹.

A. THE OBLIGATION TO PAY RENT

The tenant is often obliged to pay rent. In properly - drawn leases, there is always an express covenant by the tenant to pay rent. In the informal oral tenancy agreements which predominate in Ghana, the tenant agrees to pay rent. The obligation to pay rent is now implied in residential tenancies for valuable consideration by the Conveyancing Decree, 1973. By section 23 (1):

"In a conveyance by way of lease for valuable consideration, there shall be implied the covenants relating to the payment of rent . . ."

A covenant to pay rent must be certain or capable of being reduced to certainty by the time of payment². A tenancy agreement is void for uncertainty if rent "is to be agreed"³. Rent may, however, be made to vary with circumstances⁴.

The tenant impliedly covenants:

"To pay the reserved rent at the times and in the manner specified in the lease"⁵.

1. Holdsworth, W.S., A History of English Law, London, 1926, Vol.7, p. 226

2. Mansour v. Sukumah (1958) 3 W.A.L.376.

3. See King's Motors (Oxford) Ltd. v. Lax [1970] 1 W.L.R.426

4. See Walsh v. Lonsdale (1882) 21 Ch.D.9.

5. Conveyancing Decree, 1973 S.23 (1) and 3rd Sched., Pt.I,

The rental periods and the date on which rent is payable should be specified in a tenancy agreement. Rent, for most of the tenancies entered into orally and informally, is calculated on a monthly basis and the parties normally agree to pay rent monthly. The rent is normally payable in arrear. This conforms to the legal position, which is, that unless a tenancy agreement provides for payment in advance, rent is normally payable at the end of the rental period¹.

I. Nature of the rental obligation

At common law, the tenant is under an obligation to pay rent once possession of the premises is turned over to him. The landlord is not required to do anything further. In technical terms, the tenant covenanted to pay rent while the landlord covenanted to assure him quiet enjoyment². This common-law position again emanates from the antecedents of the landlord-tenant relationship. As Friedman points out:

"The theory of the lease as a conveyance —under which a landlord fully discharged his duty by signing a lease and thereby entitled himself to instalments of rent which were periodically to issue out of the land —fitted in well with the ancient farm lease. The lease was essentially of land; the house was incidental. Tenant got no services from the landlord and expected none"³

*This estate-concept of a residential tenancy is at odds with the concrete realities of the situation*⁴. In urban Ghana, housing rentals involve the continuous provision of services such as electricity, water, bathroom and kitchen facilities. The residential tenant pays not only for the use of physical space, but also for facilities and services which are necessary to make shelter usable by modern standards. The urban

1. See Coomber v. Howard (1845) 1 C.B.440

2. This does not mean that the landlord has an affirmative duty to maintain and protect the tenant's use and occupation. Quite the contrary. His duty is negative, i.e., to refrain from disturbing the tenant's occupation and use.

3. Friedman, M.R., Friedman on Leases, op.cit., p. 5.

4. (P.T.O.)

residential tenant contemplates no single unilateral act by the landlord but a continuous mutual exchange of consideration. In the urban residential tenancy, the amount of rent usually depends in part on the facilities and services provided. The rental obligation in the urban residential tenancy more closely resembles consideration for services than profit issuing out of land or the acknowledgement of fealty to a lord.

The common law has not taken sufficient notice of the changed nature and function of the tenancy in modern urban circumstances¹. The contractual nature of the urban residential tenancy is not sufficiently emphasised. Too much is made of a tenancy as a conveyance of an estate in land. It must be recognised that the landlords' duties no longer end with the delivery of possession and the assurance of quiet enjoyment. The modern residential landlord provides many other facilities and services which together with the physical structure constitute 'housing'². These goods and services are of the kind usually obtained by contract. The rental obligation should therefore be seen for what it is—not a quid pro quo for possession of an estate in land, but consideration for a continuous flow of goods and services.

II. Independence of covenants.

At common law, the obligation to pay rent is independent of any additional obligations undertaken by the landlord under the tenancy agreement³.

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4. See Friedman, *supra*, pp 59-64; Quinn, T.M. & Phillips, E., "The law of landlord and tenant: a critical evaluation of the past with guidelines for the future", (1969) 38 Fordham Law Review 38; Harvey, J.B., "A study to determine whether the rights and duties attendant upon the termination of lease should be revised", (1966) 54 Calif.L.Rev. 1141.
 1. See Lipsky & Neumann, "Landlord-tenant law in the United States and West Germany - a comparison of legal approaches", (1969) 44 Tulane Law Review 36; Bennett, D.E.; "The modern lease—an estate in land or a contract", (1937) 16 Texas Law Review 47.
 2. That the modern urban residential tenancy is "a package of goods and services" was recognised by a United States court in Javins v. First National Realty Corp., 428 F.2d. 1071 (D.C.Cir.1970).
 3. Hart v. Rogers [1916] 1 K.B.64; Taylor v. Webb [1931] 2 K.B.283.

The rental obligation depends on the continued existence of the estate in land, and not upon the landlord's performance of any covenant—express or implied—in the tenancy agreement¹.

This means that the common law does not relieve the tenant from performance of his rental obligation because the landlord has defaulted in the performance of obligations he undertook under the tenancy agreement. Thus a landlord who fails to carry out repairs or provide services like electricity, water, kitchen and bathroom facilities is entitled to receive rent though he has failed in his contractual obligations. Nor, it must be pointed out, can the landlord rely on the tenant's breach as an excuse for not performing his own obligations. The principle of independent covenants means that if either party defaults in the performance of his obligation the other party has a remedy on the covenant—by direct action or counterclaim—but no more².

The common-law rule that in a tenancy agreement are independent rather than mutually dependent can hardly be over-emphasised. It is the feature that distinguishes the tenancy relationship from a purely contractual relationship.

Again, the basis of this common-law rule can be found in the historical origins of the common-law tenancy. The tenancy is seen as the conveyance of an estate in land; the rental obligation as an incident of tenure—something issuing out of the land.

With the development of residential tenancies in modern urban conditions, the tenurial basis of the rental obligation was not re-examined³. What the common law did was to preserve the old landlord-tenant law with its fixation on possession as the crux of the tenancy and with rent as the quid pro quo

1. See Hart v. Rogers, *op.cit.*; Taylor v. Webb, *op.cit.*; Cruse v. Mount [1933] Ch.278.

2. But see *infra*, pp.222-224.

3. See Quinn T.M. & Phillips, E., *supra*; Friedman, M.R., "Leases—a last outpost of feudalism", (1971) 26 New York Bar Association Record 638.

for possession. The new set of rights and obligations (concerning habitability, electricity, water, repairs, etc.) are treated as incidental to the main transaction. Significantly, the additional obligations of the landlord are treated as separate and distinct¹.

III. Rent withholding

A corollary of the principle of independent obligations is the common-law rule that under no circumstance may the tenant be justified in withholding rent². A tenant who assumed that basic fairness entitled him to operate on a "no facilities, no rent" basis would be making a great mistake! He is under an obligation to pay rent as long as he is assured of quiet possession. The common law unequivocally states that where the tenant withholds rent (until the landlord discharges an obligation he has expressly or impliedly covenanted to perform) this is a breach of the tenant's rental obligation; the landlord may sue for damages or, if it is provided for, seek forfeiture of the tenancy³.

The 'absolute' nature of the obligation to pay rent is demonstrated by Mills - Lamptey v. Yeboah⁴. In this case, the landlord granted tenancy of a house to 'A', except for one room and a porch which was already let to 'C'.

The lease provided, inter alia, for a covenant for re-entry on failure by the tenant to pay rent. It is also provided that when 'C's' tenancy expired "the lessor shall automatically be deemed to have demised the said one room and one porch to the lessee". 'C' did not, however, vacate his premises at the expiration of his tenancy. 'A' then refused to pay any more rent until he had been given possession of the whole house. The landlord therefore commenced proceedings claiming arrears of rent and an order of ejectment. It was

1. But See *infra*, pp. 222-224.

2. Paradine v. Jane (1647) Aleyn.26; Hart v. Windor (1844) 12 M & W.68.

3. *ibid*.

4. [1971] 1 G.L.R.18.

held by Abban J., that the tenant was in breach of his obligation to pay rent and that the landlord was entitled to damages¹. The fact that 'A' had not got possession of the room and porch let to 'C' was irrelevant. There was no question of a partial failure of consideration, nor of a reduction in rent². The tenant had no choice but to continue to pay the full rent³.

C. Abandonment

It has become trite to repeat Holmes' dictum, but it is nevertheless true that:

" . . . the law as to leases is not a matter of logic in vacuo; it is a matter of history that has not forgotten Lord Coke"⁴.

Another anachronism of the translocated common law is that the tenant continues to be liable for rent if, without justifiable legal reason, he abandons the premises⁵. The startling fact is that the landlord may rest on the lease or tenancy and sue for rent as and when it becomes due. This result follows from regarding a tenancy as an estate in land. Abandonment (in this conception) does not terminate the estate in land, and rent being an incident of tenure remains payable.

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1. Relief was granted from forfeiture because the tenant paid the arrears of rent into court while the case was pending.
 2. In traditional doctrine rent issues out of the land, and the whole rent is charged on every part of the land.
 3. In this case the landlord continued to receive rent from 'C'. 'A' could have moved out because the landlord had not succeeded in assuring quiet enjoyment of the whole premises. But this is not practicable in a situation of housing shortage; in fact the tenant opposed the landlord's application to re-enter.
 4. Gardiner v. Butler (1918) 245 U.S.603 at 605, *quoted at p.68 supra*.
 5. Redpath v. Roberts (1800) 3 Esp.225 ; Guthrie v. McCrindle (1949) 65 T.L.R.192

This common-law rule was applied in Ogde v. Pearl & Sons Ltd¹. In this case premises were let for one year with an option to renew for a further period of four years. The tenant exercised this option, but before the expiry of the four years the tenant vacated the premises. The landlord sued to recover rent for the unexpired portion of the four - year term. This was unhesitatingly granted by Ollenu J., who said:

"Having renewed the lease for four years, it was not open to the tenants to dispute their liability for payments of rents for the full period of the renewed term of four years"².

In Savage v. G.I.H.O.C.³, premises were let to the tenant for fifteen years, with an option to determine the tenancy on the expiration of the first eight years after giving six month's notice. After a year the tenant abandoned the premises. The landlord sued for damages for breach. Delivering judgment, Edusei J., said:

"There is no doubt whatsoever in my mind that the defendants were in breach of their contract, and what are the consequences? The plaintiff in my judgment is entitled to the rents for the whole of the unexpired term as damages"⁴.

The learned judge then awarded £ 36,906 — rent for the unexpired period of fourteen years—as damages.

The learned judges did not analyse the rule so as to seek to justify it; they just took it as an eternal 'given'. It is not even clear from their judgments whether the landlords had left the premises unoccupied for the remainder of the term—which they are required to do under common law if this

1. [1961] 1 G.L.R.142. The case involved a business letting.

2. *ibid.*, at 144.

3. [1973] 2 G.L.R.242.

4. *ibid.*, at 248.

rule is to apply. In fact in Savage v. G.I.H.O.C. the case was heard on 19th April, 1973, and damages was for a period from May 1st, 1970 to 30th April, 1984; it was impossible for Edusei J., to know that the landlord will not re-let or occupy the premises, and he made no order to that effect. At common law abandonment does not operate to terminate the tenancy and the tenant's estate continues; for the landlord to recover rent, he must leave the premises unoccupied. If the landlord had re-let or occupied the premises then the tenant is under no obligation to pay rent¹.

The common-law position is monstrous; it imposes no obligation on the landlord to mitigate his losses, and it imposes no obligation on the landlord to re-let whatever the housing situation and no matter what opportunities for re-letting he may have had. But the decisions in Ogde v. Pearl & Sons and Savage v. G.I.H.O.C are both monstrous and illogical. They follow the common law in not requiring the landlord to mitigate his losses, but do not insist on the foundation upon which this is based—the continued estate of the tenant and consequently the need for the premises to remain unoccupied.

The common-law doctrine of constructive performance has long since been discarded in contract law, the party not in breach being required to take steps to mitigate his losses. There is no justification for distinguishing the modern urban tenancy from the ordinary executed contract. And, to quote Holmes:

"It is revolting to have no better reason for a rule than that it was so laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past"².

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1. See Walls v. Atcheson (1826) 3 Bing 462; Hall v. Burgess (1826) 5 B. & C.332; Woodfall, Law of Landlord and Tenant, op.cit., p.310, para 1-0777
 2. Holmes, O.W., "The path of the law", (1897) 10 Harvard Law Rev.457 at 469.

It is suggested that where a residential tenancy is repudiated and the premises abandoned the residential tenancy should be considered as terminated. The landlord must re-take possession of the premises and the obligation to pay rent must cease. The landlord must take reasonable steps to re-let. The landlord can sue for damages for breach of the tenancy agreement. The quantum of damages should be the difference between the rent payable under the tenancy and what the landlord receives from re-letting the premises. If the landlord occupies the premises himself the rent specified for that type of premises by the Rent (Amendment) Decree, 1979¹ should be taken as the monetary value of the premises to the landlord.

d. Destruction of premises

The common-law rule is that a tenant is not relieved from paying rent by the whole or partial destruction of the premises (by bomb, fire, storm, tidal wave, etc.). This is so even where premises are the subject-matter of the tenancy². Nor would equity intervene³. If the tenant wants his rental obligation to cease on the destruction of the premises, this should be expressly provided for in the tenancy agreement.

In reaching this conclusion the courts reasoned that the residential tenancy (like any other lease or tenancy) is a conveyance of an estate in land, and that the destruction of the premises did not destroy this estate⁵. There is thus no failure of consideration. The tenant has what he bargained for (ownership of a term) despite the destruction of the premises; from this estate rent issued and ought to be paid. Lord Goddard epitomised this view when he said:

1. A.F.R.C.D.5. See PP.258-265.

2. Paradine v. Jane (1647) Aleyn.26; Mathey v. Curling [1922] 2 A.C.180.

3. Leeds v. Chatham (1827) 1 Sim.146.

4. Paradine v. Jane, supra; Mathey v. Curling, supra.

5. Baker v. Holtzapfell (1811) 4 Taunt.45; Izon v. Gorston (1830) 5 Bing.N.C.501.

"In the case of a lease, the foundation of the agreement is that the landlord parts with his interest in the demised property for a term of years, which thereupon becomes vested in the tenant, in return for a rent. So long as the interest remains in the tenant, there is no frustration, though particular use may be prevented"¹.

The common-law rule may not have been out of fit at the time and in the circumstances in which it developed—an agricultural tenancy primarily concerned with land as a factor of production. Whatever structures were on the land were of a rudimentary nature, and were incidental to the main purpose of the transaction—farming. Damage to or destruction of the premises might make life inconvenient, but the land could still be used.

This is out of fit with the realities of residential tenancies in modern urban Ghana. The residential tenant is not interested in land as a factor of production. He needs housing and that is the raison d'être of the arrangement. It is therefore suggested that if through no fault of either party the basis of the arrangement is removed the residential tenancy should (like any other contract) be considered as having been frustrated². This would be much more in accord with the expectations of society, of the tenant and, it is submitted, of the landlord. The residential tenancy should be seen for what it is - a contract for the continuous exchange of value, rather than the single purchase of an estate in land for a term..

e. Deductions

The worst effects of the absolute nature of the rental obligation and the principle of mutually exclusive covenants would be somewhat mitigated by a more vigorous pursuit of the right of the tenant to make deductions from rent in appropriate cases.

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1. Cricklewood Prop. & Investment Trust Ltd. v. Leightons Investment Trust Ltd. [1945] A.C.221, 245.
 2. The question whether frustration applies to tenancies is discussed below, pp.289-292.

There are some old English-law cases which give the tenant a right to make deductions from his rent in certain cases. In Taylor v. Beal¹, the right of the tenant to make repairs which the landlord had covenanted to do was recognised by two Justices in the Court of Queen's Bench.

In the more recent English case of Lee-Parker v. Izzet², Goff J., relying on these cases, held that a tenant has a right to effect repairs which are the responsibility of his landlord; he may then recoup himself by making appropriate deductions from future payments of rent.

It is submitted that Lee-Parker v. Izzet provides facility with which to make serious inroads into the principle of mutually exclusive obligations. Lee-Parker should not be limited to repairs but should be extended to cover all the service obligations undertaken by the landlord—like the provision of water, electricity, kitchen and lavatory facilities. As Rank points out:

"It may be argued that even today, when great strides are being made to provide court services which are both efficient and inexpensive, there is considerable merit in allowing a tenant to have resort to an extra-judicial remedy in order to enforce a right conferred by the lease"³.

The tenant's recourse to such self-help must be preceded by timely and adequate notice to the landlord of the default. This is to afford the landlord the opportunity of fulfilling his obligations. If the tenant is unable to give such notice after a reasonable attempt, he may nonetheless proceed to perform the landlord's obligation and recoup himself from the rent.

1. (1591) Cro.Eliz.22; Weigall v. Waters (1795) 6 Term.Rep.488.

2. [1971] 1 W.L.R.1688.

3. Rank, P.M., "Repairs in lieu of rent", (1976) 40 Conveyancer 196, 200.

It must be emphasized that under this remedy the tenant is not relieved of his obligation to pay rent. He has to perform the landlord's obligation, and then recoup the cost from the rent. If he does not perform the obligation he has no right to withhold rent.

II. RELIEF FROM THE OBLIGATION TO PAY RENT

"A rent is something given by way of retribution to the lessor, for the land demised by him to the tenant, and consequently the lessor's title to the rent is founded upon this: that the land demised is enjoyed by the tenant during the term included in the contract: for the tenant can make no return for a thing he has not. If therefore the tenant be deprived of the letting, the obligation to pay rent ceased, because such obligation has its force only from the consideration, which was the enjoyment of the demised"¹.

a. Actual eviction

Where the landlord failed in his basic obligation to assure his tenant of quiet enjoyment and (either personally or vicariously) entered the premises and removed the tenant prior to the expiration of the tenancy, the law abated the obligation to pay rent². Eviction by title paramount is also a defence to an action for subsequent rent³.

If the landlord evicts the tenant from only a part of the premises the tenant is discharged from payment of the whole rent. The reason given for this rule is that enjoyment of the whole consideration is the foundation of the obligation to pay rent and that the obligation cannot be apportioned⁴. It is also said that the landlord may not apportion his own wrong. It is, however, arguable that in applying the "no apportionment of wrong" rule regard should be had to the magnitude (or minitude) of the wrong.

1. Baron Gilbert, A Treatise on Rents, Dublin, 1792, p.145.

2. See Morrison v. Chadwick (1849) 7 C.B.266; London & Country (A & D.) v. Wilfred Sportsman [1969] 1 W.L.R.1215.

3. See Cuthbertson v. Irving (1859-60) 4 H & M.142. This is particularly important because of the hierarchical system of landholding: See *supra*, pp.90-97.

4. (P.T.O.)

b. Constructive eviction

Constructive eviction, like actual eviction, arises as a result of breach of the covenant for quiet enjoyment. Unlike actual eviction, however, the landlord does not physically eject the tenant. The remedy arises when the landlord makes enjoyment of the premises so intolerable that the tenant abandons the premises. Constructive eviction is established when the tenant shows that the landlord has prevented or materially interfered with the tenant's enjoyment of his possessory rights¹. Upon abandoning the premises in such circumstances, the tenant's liability for rent ceases. To successfully assert the defence of constructive eviction the tenant has to establish three facts:

- (1) that the landlord had acted or failed to act in a way which violated an obligation imposed on him by statute or by an express or implied covenant of the tenancy;²
- (2) that the nature of the landlord's act or omission constituted an interference with the tenant's quiet enjoyment of the premises or indicated an intention to evict the tenant;³
- (3) that the tenant abandoned the premises.

The tenant has to prove all three elements; failure to prove any of them will render the tenant liable to pay rent.

The significant point is that the common law is unwilling to classify the interference — want of repair, failure to provide services, etc. — alone as abating the tenant's liability or modifying the quantum of rent. The common law insists that the tenant actually abandons the premises before the

4. See London & County (A. & D.) v. Wilfred Sportsman, *supra*.

1. See Vandiyar v. Pereira [1953] 1 All E.R.1109, where gas and electricity were cut off.

2. See Karam v. Ashkar [1963] 1 G.L.R.138, where the landlord demolished part of premises so as to make it unsafe for tenant to remain in the rest.

3. See Kenny v. Preen [1962] 3 All E.R.814, where the landlord threatened the tenant by letter and by shouting and banging on the doors.

doctrine can be invoked. The doctrine is not so much constructive eviction, but constructive eviction with abandonment. Abandonment is the crucial factor which places the case in the category of eviction.

The attempt to mitigate the worst effects of the principle of mutually exclusive obligations by developing the fiction of constructive eviction is praiseworthy; but it contains a radical drawback. The doctrine of constructive eviction only applies where the tenant abandons the premises. The fact of gross negligence on the part of the landlord to carry out his contractual obligations is not enough to support an abatement or reduction in rent.

The doctrine therefore, has little utility in the concrete situation of urban Ghana where the availability of alternative accommodation is severely⁰_^ restricted. The remedy, in this respect, reflects considerations of landlord/tenant relationships which do not exist in urban Ghana. To offer the Ghanaian tenant the right to move out when electricity or water supply is disconnected because the landlord has not paid the bills, or when the ceiling begins to buckle is to offer him no remedy at all. He just has "no where" to go. That socio-economic realities in modern urban settings have eroded the foundation on which the requirement of abandonment rested was recognised by a New York Court when it said:

"Implicit in these once benign . . . decisions was the presumption that there was always available other premises to which the tenant could move. The grim realities of the acute housing shortage reduce this time-worn presumption to sheer ~~negativity~~ ; a postulate exploded by facts"¹.

The requirement of abandonment is an anachronism; retaining it makes no sense in the light of the present realities of the housing situation².

1. Johnson v. Pemberton (1950) 197 Misc.739, 97 N.Y.2d.153, 157.

2. Due to socio-economic and political facts it is not thought likely (at least in the foreseeable future) that giving the tenant the legal right to withhold or reduce rent would be effective.

III. ENFORCEMENT OF THE OBLIGATION TO PAY RENT

A landlord usually has three distinct remedies against a tenant who is in arrears of rent. He may:

- (1) sue on the covenant to pay rent for arrears of rent;
- (2) levy distress upon the tenant's goods; or
- (3) seek to terminate the tenancy by forfeiture under the tenancy agreement.

a. Action for rent

Arrears of rent, like any other debt, is recoverable by an action in contract¹.

b. Distress

Distress, even in England where it developed, "is an archaic remedy that has largely fallen into disuse"². It is a self-help remedy by which the landlord can seize and sell chattels found on the premises.

The subject of distress is extremely intricate and it is not intended to examine it, since the law on the subject is purely English law³. One only wonders why the Courts Act, 1971 continued the application to Ghana of English legislation on the subject⁴, when in 1969 the Payne Committee had recommended the abolition of the "highly complex, technical and archaic law"⁵.

1. Diep v. Kaba [1973] 2 G.L.R.190.

2. Abingdon R.D.C. v. O'Gorman [1968] 2 Q.B.811, per Lord Denman at 819.

3. See Woodfall, Law of Landlord and Tenant, op.cit. Chap.8; Foa, General Law of Landlord and Tenant, op.cit., pp.480 - 585.

4. The Courts Act, 1971, S.111 (1) continued the operation of certain provisions of the Distress of Rent Acts, 1689 and 1737.

5. Report of the Committee on the Enforcement of Judgment Debt, London, 1969, Cmnd.3909, paras.912-932.

c. Forfeiture

Re-entry or forfeiture is not in itself an action for the enforcement of the obligation to pay rent. But it often results in the payment of rent as tenants attempt to obtain relief from forfeiture.¹

B. OBLIGATIONS OF THE LANDLORDI. Rent cards

Section 20(I) of act 220 enjoins every landlord of a monthly tenancy² with a rent card within seven days of the commencement of the tenancy. The card must contain the names and addresses of the parties, the amount of the recoverable rent of the premises and the rights and obligations of the parties. Entries in the card are to be kept up to date and signed by the landlord. It is the responsibility of the landlord to provide the tenant with the card. Failure to provide a rent card is a misdemeanour punishable with a maximum fine of £G 100(£.?) or six months' imprisonment or both.³

The effect(in private law) of failure to provide a rent card is,however, not clear. In Mensah v. Abbey-Quaye⁴, the landlord failed to provide his monthly tenant with a rent card. In a claim for arrears of rent, it

1. See infra, pp.292-305.

2. Section 20(I) actually says;"Every landlord of any premises on monthly or shorter tenancies". It is however, submitted that few (if any) such shorter tenancies exist: See Allamedine Bros. v. P.Z., op.cit., at 410. This is due to the fact that wages and salaries are as a rule paid monthly and calculation of rent is (at the lowest) based on a monthly period.

3. Act 220, s.25(1) (f).

4. [1975] 2 G.L.R.463.

was held that the burden of proving non-payment was on the landlord and that having failed to provide the tenant with a rent card as required by law, the landlord denied himself the vital documentary evidence for the claim. Baidoo J., therefore, held that the conflicting evidence adduced by the parties as to the rent due and payable must be resolved in favour of the tenant. It is submitted that Mensah v. Abbey-Quaye did not really determine the private-law effect of failure to provide a rent card. In Mensah v. Abbey-Quaye, the conflicting evidence of the parties was resolved in favour of the tenant because the landlord was responsible for the conflict. But what if there is no conflict? What if a tenant argues that he is under no obligation to pay rent because the landlord had failed in his duty to furnish him with a rent card?¹

II. Written receipts

Every landlord is required to provide the tenant or any person making payment in respect of rent, with a written receipt². The receipt must give the particulars of the premises, the amount paid, the period for which the rent has been paid and the name of the tenant³.

It should be noted that the provision of receipts for rent paid, unlike the provision of rent cards, applies to all tenancies of whatever duration.

Responsibility for giving the receipt is on the landlord. Failure to give receipts may result in the landlord encountering difficulty in claims for arrears of rent.⁴ It is also a misdemeanour punishable by a maximum fine of £6.100 or six months' imprisonment or both.⁵

failure to provide a rent book though a crime does not preclude the landlord from obtaining rent: See Shaw v. Groom [1970] 2 Q.B.504.

2. Act 220, S.33.

3. *ibid.*

4. See Mensah v. Abbey-Quaye, *op.cit.*

5. Act 220, S.25 (1) (I).

III. Fact or fiction?

As with so much of the provisions of Act 220, these provisions are blatantly disregarded. Fieldwork by the present writer indicated that about 90% of monthly tenants are not issued with rent cards as required by law¹. An even greater number of tenants are not supplied with written receipts when they pay rent². The reasons for the ineffectiveness of or non-compliance with the provisions of Act 220 are considered later³. It is however of some interest to note that even in more educated England, with a longer acquaintance with rent control legislation, the requirement to issue rent cards is largely ignored. The Francis Committee reported that the provisions of the Landlord and Tenant Act, 1962 requiring landlords to supply tenants with rent books is largely ignored⁴. Tenants fear that they will be evicted if they insist on one⁵. To encourage compliance with the requirement, Harry Street has suggested that (as a last resort) rent should cease to be recoverable if the landlord refuses demands to provide a rent book⁶.

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1. In the survey of 1658 monthly tenants, only 86 tenants (about 6%) had been issued with rent cards: See also Mensah v. Abbey-Quaye, op.cit.
 2. In the survey only 7 (i.e. apart from the 86 who had rent cards) of the 2,000 tenants are regularly issued with receipts when they make payments.
 3. See infra, Chapter 9, pp.334 - 368.
 4. Committee on the Rent Acts, H.M.S.O., 1971, Cmnd.4609, p.216; See also Select Committee on Race Relations and Immigration, Report on Housing, H.M.S.O., H.C.508-1/1970-71, para.177.
 5. *ibid.*
 6. "The Rent Act, 1974: an evaluation", (1974) 38 Conv.394. This suggestion is only helpful when a case gets to court, a tribunal, or rent officer. Though this may reverberate through the landlord-tenant market it is doubtful whether it would have effect on the large number of tenants who keep their peace and continue paying rent.

CHAPTER SEVENRENT CONTROL

"Since the First World War the tempo of social change has accelerated beyond all imagination. With it, the challenge of the law has become more powerful and urgent"¹.

Introduction

Restriction of rental levels is an issue which has entered into the political economy of many countries as they grappled with the problems posed by man's struggle for shelter in an urbanizing world. There has been vigorous debate on the need and usefulness of rent restriction.

On the one hand are Nobel Prize winning laissez faire economists like Milton Friedman and Frederich von Hayek who, drawing on their experience in the United States and in Austria respectively, have argued that rent restriction is an unmitigated disaster². Echoing this view F.G.Pennance, introducing a collection of essays (all from a laissez-faire perspective), sees this as the lesson to be drawn from the experience of rent control:

"Their common message is simple, but devastating in its criticism of policy. It is that in every country examined, the introduction and continuance of rent control/restriction/regulation has done much more harm than good in rental housing markets—let alone the economy at large—by perpetuating shortages,
encouraging immobility,
swamping consumer preferences,
fostering dilapidation of housing stocks and eroding production incentives,
distorting land-use patterns and the allocation of scarce resources

1. Friedman, W., Law in a Changing Society, London, 1972, p.47.

2. See Verdict on Rent Control, Readings No.7 (I.E.A., 1972).

— and all in the name of the distributive justice it has manifestly failed to achieve because at best it had been related only randomly to the needs and individual income circumstances of households"¹.

This is a formidable catalogue of failure. It springs from classical economic theory's conception of 'rent' as an information and distributive mechanism which functions properly through the 'free' equation of supply and demand². Rent is seen as a mechanism which maximises utility and consumer preference. The level of rent, in this model, is determined by consumer preference. To quote W.F.Smith:

"The answer lies in the word 'rationing'. If some useful commodity is fixed in supply, then it becomes important in both an economic and business sense to use the commodity as fully and as effectively as possible. If no rents were charged for the use of land or buildings, these commodities might be used by people who derive relatively little advantage from them to the exclusion of people who can use them most beneficially . . . Economic rent rations a fixed resource by excluding all potential users except the one who derives maximum benefit from the resource, very broadly, all market prices are rationing devices and economic rent is an important special type"³.

Rent control is said to result in the above disasters because it interferes with the 'natural' operation of the market.

1. *op. cit.*, p.XI

2. See Gray, M., The Cost of Council Housing, Institute of Economic Affairs, pamphlet No.18, London, 1968.

3. Housing: The Social and Economic Elements, Berkeley, California, 1971, p.20.

It is not possible to test Pennance's hypothesis in the concrete Ghanaian context because rent control has largely been ineffective. But it may be stated—first, at the purely analytical level—that the evidence (and it is quite formidable) at best proves that restriction of rental levels in a predominantly capitalist mode of housing production leads to those results. It cannot be seen to prove that rent control qua rent control leads to those results. It is no use abstracting the restriction of rental levels from the particular mode of housing production and, indeed, from the economic system as a whole. All the countries examined in that Institute of Economic Affairs' Reading have a capitalist mode of housing production—and this includes the United Kingdom where the mode of production of even council housing is basically capitalist¹.

Secondly, as the analysis of the housing situation in Ghana and the private rental sector has shown², there is nothing 'natural' about the operation of the private rental market—or indeed of any market. It is man-made. It can be manipulated, taken advantage of or favour one side against the other as a result of the concrete market-- situation. The prime weakness of the laissez faire analysis of the 'natural' determination of rental levels is that it crucially ignores the role of the bargaining power of the parties in determining the level of rents. This failure leads laissez-faire political economists to posit a rather warped view of consumer need. Thus Gray writes:

1. See Beirne, P. . , Fair Rent and Legal Fiction, London, 1977.

2. See *supra*, pp.47-56.

"Profitability is a good preliminary criterion of consumers' requirements because it reflects their willingness to pay. Therefore in a market houses are maximised; when their value to consumers is maximised; that is when relative rents and prices reflect the highest subjective values that could be placed on the housing stock"¹.

Not only is the idea of willingness illusory since most tenants have no real choice in the matter. It is also inadequate because it cannot account for the ability (or lack of it) to pay, for which one has to examine the socio-economic circumstances of the tenant and the wider socio-economic and political context. With a far greater degree of precision, it can be said that the level of rent at any moment is much more a function of the relative bargaining strength of landlords and tenants - which fact is determined by the socio-economic and political system within which the parties are operating.

The laissez-faire analysis also fails to recognize the monopoly nature of the rents charged by most landlords. In other words, the command of a scarce asset is itself a source of rent. The level of rent in the concrete Ghanaian context is not determined by "willingness", "utility" or "consumer preference" however these are determined. It is determined by power - command of a scarce asset. An item in a recent issue of West Africa² reported the Managing Director of Tema Development Corporation as saying that one woman had eight T.D.C. houses. She let them out at ₵ 300 - ₵ 400 a month each compared to the official corporation rent of ₵ 20 and ₵ 30 a month. It is the height of naivete to suppose that the rent being charged by this lady was determined by peoples' willingness or requirement and a maximization of consumer preference. It was the result of power — her command of one of the

1. Gray, M., The Cost of Council Housing, Institute of Economic Affairs, pamphlet No.18, London, 1968.

2. No.3300, 20th Oct.1980, p.2090.

necessaries of human existence in a concrete housing situation characterised by shortages, scarcity and over-crowding¹.

Another argument used by the anti-rent restriction lobby is what will be called "the perverse equity argument". "It is not fair to tax or restrict the level of profit to be made from housing investment if the return on other forms of investment is not controlled", they will argue. "We recognise that some people (particularly the poor) have difficulty in paying the economic rent, but that is a poverty problem to be tackled by the whole community. Why should landlords have to carry society's burden?" The argument is perverse for a number of reasons. The measure of freedom it assumes in other areas of investment is exaggerated. There are controls and restrictions on monopolies and cartels in almost all developed economies. Windfall tax is also not unknown - the Chancellor of the Exchequer of the United Kingdom has just imposed a Windfall tax on the profits of oil companies operating in the North Sea because of the continuing increase in the price of oil. There is a good case for extending the windfall tax to the profits of the banks.* Secondly, it is not unfair for society to carve out an area of activity as being unsuitable for the unbridled operation of the profit motive. Admittedly, in a predominantly capitalist economy this would have an effect on investment in that sector. The "perverse equity argument" is not applicable to Ghana because prices of a whole host of things are subject to legal controls². The fact that the controls have failed is not material to the present argument. In fact it is arguable that one of the reasons for the failure of rent control has been the failure of other forms of price control.

1. See supra, pp.47-56.

2. See Date-Bah, S.K., "Legislative control of freedom of contract", op.cit. (There has been a measure of liberalization since the script was written.)

* The Chancellor has in his Budget of 10th March 1981 (delivered when the thesis was with the typist) introduced such a tax on the profits of the banks.

A system of rent control involves the legislative limitation of the amount which landlords can receive from their tenants in the form of rent - which limitation essentially prevents the landlord from extracting rent based on the scarcity of housing supply. This is often complemented with provisions offering the tenant greater security of tenure by restricting the circumstances in which the landlord can lawfully evict the tenant¹.

The housing shortage —for which rent control is a palliative—had by the early 1940's become sufficiently serious to make legislation necessary for the control of rental levels. The first in a series of legislation to control rents of premises was enacted in 1942². The problem of high rents—like that high prices of several other commodities—had become pronounced during World War II³. Workers were spending a greater portion of their income on rent⁴. To deal with this, the colonial government established a standing Advisory Committee on the Cost of Living. In December 1941 the Committee recommended the granting of a bonus to insulate workers from the worst effects of the difficult economic times⁵. In recommending this bonus the Committee noted that:

"... there is a serious danger with regard to certain areas particularly in Sekondi - Takoradi where the full benefit of the bonus may be lost by a general increase in rents"⁶

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1. Defence (Rent Restriction) Regulations, 1942.
 2. See Report of the Standing Advisory Committee on the Committee on the Cost of Living para.8(12), reproduced in Report of the Committee of Enquiry into Rentals, Accra, 1951.
 3. *ibid.*, para.8 (14).
 4. *ibid.*
 5. Report of the Standing Advisory Committee on the Cost of Living, para.8 (14), reproduced in Report of the Committee of Enquiry into Rentals, Accra, 1951.
 6. *ibid.*

It was a result of this recommendation that the government enacted the Defence (Rent Restriction) Regulations 1942; and thus began the chequered experience of rent control legislation in Ghana¹.

The present parent legislation for the control of rents is the Rent Act, 1963 (Act 220). Act 220 was enacted on the basis of recommendations by the Committee of Enquiry into the operation of the Rent Control Ordinance (No.2), 1952².

A. APPLICABILITY OF ACT 220

The Act applies to all premises³, subject to these exceptions:

- (a) government buildings occupied by public officers by virtue of their employment.
- (b) tenancies of government buildings certified as being let at a rent which yields no financial gain to the government
- (c) any market stall owned by a local authority

'Premises' is defined by the Act as:

"... any building, structure, stall or other erection or part thereof, moveable or otherwise, which is the subject of a separate letting, other than a dwelling house or part thereof bonafide let at a rent which includes a payment for board or attendance, and includes land, out-buildings or appurtenances let together with such premises at a single rent when adjoining the premises let therewith"⁴.

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1. For an account of these, see Report of the Committee of Enquiry into the Operation of the Rent Control Ordinance (No.2), 1952, Accra, 1962, Appendix 4
 2. Hereafter referred to as the Kwaku Bonsu Committee.
 3. Act 220, S.1 (1).
 4. Act 220, S.1 (2).
 4. Act 220, S.36.

The definition of "premises" excludes lodgers at a hotel, hostel or other accommodation where the tenant's rent includes payment for board or attendance. Such an arrangement must, however, be above board, and should not be entered into with a view to circumventing the Act. The definition further indicates that the building or structure need not be permanently and inextricably fixed to land. Therefore a movable kiosk or structure having a reasonable connection with land can be called "premises" within the meaning of the Act.

As observed earlier, a tenant need not comply with the English law requirement of exclusive possession in order to take advantage of Act 220¹. A lease is defined by the interpretation section of the Act as including:

" . . . every agreement for the letting of any premises, whether oral or otherwise, and whether the terms thereof grant the right of exclusive occupation to the tenant or include the use of any premises in common with the landlord or any other person or with the landlord and any other person"².

Thus beside the normal legal meaning given to a lease, a mere agreement to let any premises will also be known and treated as a full lease for the purpose of the Act³. The definition further indicates that for purposes of Act 220 a complete and valid tenancy of any duration can be made by writing or by word of mouth. The distinction drawn by the Conveyancing Decree, 1973, between a tenancy for three years or less and are more than three years,⁴ is therefore applicable when it is sought to apply Act 220.

1. General Application of Act 220

Act 220 is general in application—in that, there is no limitation on the value of premises to which it applies; nor is it limited to some parts of Ghana only. The fact that there is no limit on the value of premises to

1. Supra, Chapter 2, pp. 69-71.

2. Act 220, S.36.

3. This is much more like the equitable principle enunciated in Walsh v. Lonsdale (1882) 21 Ch.2.9.

4. Supra chapter 3, pp. 98-99.

which Act 220 applies has been criticised by Bentsi-Enchill¹. Bentsi-Enchill argues that the rent-fixing machinery should be confined to "small tenements" and that in the case of "property involving large sums of money" the parties can take care of themselves². He argues that the general application of Act 220 may be an inducement for corrupt practices by Rent Officers³, and may prevent the accumulation of capital by Ghandians⁴. He thus concludes that discrimination between "small" and "large" tenements is called for. This criticism of the general application of Act 220 seems to proceed from a laissez-faire ideological standpoint. Says Bentsi-Enchill:

"For the purpose of protecting those who cannot protect themselves the case for such legislation and machinery seems unexceptionable, especially in present-day circumstances. But there would seem to be little or no justification for the changing of rent controls on all types of premises including those where the parties can take good care of themselves"⁵.

He thus advocates for;

" . . . a policy refraining as far as possible from interfering with contractual relationships except in situations of clear justification"⁶.

Such freedom of contract theorising is difficult to justify in the context of the concrete socio-economic realities of the Ghanaian situation.

1. Ghana Land Law, London, 1964, pp.295-196; 305-308.

2. *ibid.*, pp.305-306.

3. *ibid.*, pp.305-306.

4. *ibid.*, p.307.

5. *ibid.*, pp.295-296.

6. *ibid.*, pp.295-296.

Admittedly in 1964—when Bentsi-Enchill wrote his Ghana Land Law—the housing shortage was not as^{severe} as it is today. But even then there was a housing shortage in urban Ghana¹. The situation has since worsened.

The contention that some people can take care of themselves is inaccurate².

The landlords^s are operating in a strong sellers' market situation; freedom of contract in such circumstances is therefore a fiction.

But Bentsi-Enchill's suggestion that rent control should be limited to "small tenements" is ill-advised from a purely jurisprudential standpoint. Controls limited in scope tend not to work³. In the first place, there is the problem of where to draw the line⁴. Secondly, landlords *may decide* to take their premises out of the category of "controlled premises" if rent control is limited in scope. A landlord may, for example, decide to let a whole house rather than let single rooms.* Thirdly, since it does not appear equitable that landlords of "small tenements" should be required to charge controlled rents while landlords of "large tenements" are left to do as they please, the moral authority of the legislation is undermined and non-compliance "justified".

B. PROHIBITION AGAINST PAYMENT OF ADVANCES

It is a criminal offence to demand—as a condition for the granting, renewal or continuance of a tenancy—an advance payment of more than one month's rent in the case of a monthly tenancy⁵. In tenancies exceeding six months, the advance payment should not be more than six months' rent⁶. Upon conviction by the rent magistrate for such an offence, the landlord or his agent shall be liable to a fine not exceeding £G100⁷.

1. Bentsi-Enchill admitted to this state of affairs at p.295. The Kwaku Bousu Committee reported at pp.9-10, para.4 that:

"there is still a shortage of suitable accommodation".

2. Admittedly some tenants are more able to pay the rent charged by landlords. But that is different from asserting that they can take care of themselves; the tenant is forced by circumstances to pay a rent higher than he would have contracted for if supply and demand were in equilibrium.

3. *infra*, pp.253-255 also Chapter 9, pp.334-368.

4. It is important to note that Bentsi-Enchill gives no indication as to where

(cont.)
(cont.)

* See Woodman, G. R., "The recent rent control legislation" (1973) 8 *Legon Observer* 198, 200.

The problem of huge sums of money being demanded in advance as a condition for the grant of a tenancy is one of long standing. As far back as 1947, it was noted that in certain places, particularly Kumasi, several months' rent was being demanded in advance from prospective tenants, and that this was causing hardship¹. A statute was thus passed making it an offence to demand payment in advance of more than one month's rent in the case of monthly tenancies, and more than three month's rent in the case of others². The problem of huge sums of money being demanded as advance payment of rent is also one of the complaints noted by the Kwaku Bonsu Committee³.

Once again the general application of section 25 (5) is criticised by Bentsi-Enchill⁴. He argues that the provision prohibiting payment of large sums of money as rent in advance should have been limited to "small tenancies" where the tenant needs protection, and that parties in "larger tenancies" can take care of themselves. He asks:

" . . . what is the justification for preventing a houseowner who grants a twenty-year lease of a whole building to say, the U.A.C. from taking say, ten years rent in advance?"⁵.

contd.

the line should be drawn; nor does he offer any criteria for doing so. He gives no indication as to what "small tenements" are.

5. Act 220, S. 25 (5)

6. *ibid.*

7. *ibid.*

1. Report of the Committee into Rentals, 1951, *supra*, para. 8 (22)

2. Rent Control (Amendment) Ordinance (No. 39 of 1947).

3. *op.cit.*, p. 18, para. 20 (1) (k).

4. Ghana Land Law, *op.cit.*, p. 307.

5. *ibid.*

Bentsi-Enchill argues that such advance payments may be used to build new houses thus easing the housing situation; and that the effect of section 25 (5) would be to prevent capital accumulation by Ghanaians thus preventing them from entering industry¹.

Bentsi-Enchill was particularly clever in his choice of tenant in the above question². But is the operation of such welfare legislation to be dependent on who the tenant happens to be? Jurisprudentially, is it possible or desirable³. How do we protect prospective tenants needing to rent a whole house for residential purposes?⁴ What about the emerging Ghanaian industrialist or businessman; how is he to be protected from having to use a large part of his capital as advance payment of rent? The last question is not hypothetical. In Twene v. Farah⁵, a would-be tenant anxious to set-up a store in Accra paid the defendant who was building a house ₵5,000.00, on the understanding that the money would be used to complete the house but would be applied to future rent and embodied in the tenancy agreement. A similar amount was paid by four other prospective tenants. In each transaction no receipt was issued. When the tenants moved into occupation the landlord demanded and received

1. Ghana Land Law, *op.cit.*, p. 307.

2. U.A.C. is not typical of the Ghanaian tenant. U.A.C. is the largest conglomerate in Ghana. It is part of the Unilever empire. It has wide-ranging interests including textiles manufacturing, beer brewing, soap and toothpaste manufacturing, etc. Not many Ghanaians would be unduly bothered about U.A.C. having to pay ten years' rent in advance. But it is arguable that such atypical tenants do not provide a sufficient enough basis for limiting the scope of section 25 (5).

3. *Supra*, pp. 239-240; *infra*, pp. 253-255; see also Chapter 9, pp. 334-368.

4. The fieldwork indicated that prospective tenants wishing to rent three-bedroom houses at ₵5,000.00 a month are being asked to pay one year's rent in advance.

5. (1970) C.C.120. The case involved a commercial letting, but it is none the less revealing.

another four months' rent in advance. The rent had been assessed by the Rent Officer at ₵45.00 a month¹. When the tenancy agreements were drawn it did not reflect the ₵5,000.00 the tenants had each paid. The landlord argued that the ₵5,000.00 the tenants had each paid was a payment for goodwill and not advance payment of rent. This contention was rejected by Anterkyi J., who said:

" . . . if it had been the practice of landlords in Accra, or elsewhere in Ghana, to rent rooms as trading shops on the basis of an initial lump sum payment as mere goodwill in relation to the area of the premises, and not as rent legally payable in advance under Act 220 . . . it must be deemed to be interred by this judgment"².

Bentsi-Enchill notes that section 25 (5) is often circumvented³ and argues that this indicates the need for discrimination between "small" and "large" tenements⁴. This is difficult to understand. The ineffectiveness of or non-compliance with the provisions of Act 220 is due to the housing shortage and the concrete socio-economic realities, and not to the general application of its provisions⁵.

C. THE RECOVERABLE RENT

I. THE RENT ACT, 1963 (ACT 220). 1963-1979.

The primary aim of Act 220 is to control the level of rents. But the Act attempts to do this not by fixing rigid universal standards. Rather, it provides criteria by which to determine which rents are recoverable and which are not. The recoverable rent is the rent which can properly be charged - the rent imposed or sanctioned by the Act⁶.

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1. The tenants thus paid more than nine years' rent in advance.
 2. (1970) C.C.120.
 3. Ghana Land Law, op.cit., P.30⁴. The Kwaku Bousu Committee reported that many tenants complained about having to pay "heavy advances". Twene v. Farah also illustrates that the practice is still prevalent. Our field-work indicated that the practice is widespread. Six months' rent in advance is not uncommon in the case of monthly tenancies. In some cases one years' rent is demanded in advance. In one case in North-Labone, Accra, three year's rent was paid in advance for a ten-year lease.

(cont.)

The recoverable rent is defined in the interpretation section of Act 220¹. Basically, it is the rent which was payable on the 1st July, 1960. Where the premises ~~were~~ not let on the 1st of July, 1960 —but ~~were~~ previously the subject-matter of a tenancy—it is the rent at which they were last let. If the premises were first let after July 1st, 1960, the recoverable rent is the rent agreed upon by the parties at the time when the premises were first let. The recoverable rent for furnished premises is dealt with by section 30. If the premises were let on 1st July, 1960—or not being let on that day was previously let—it is the rent at which the premises were last let with the furniture before July 1st, 1960. In the case of premises let after 1st July, 1960, the recoverable rent of the premises if let unfurnished is added to one - sixtieth of the true value of the furniture at the commencement of the tenancy.³

The recoverable rent is therefore determined—in most cases—by the contractual rent agreed upon at a particular point in time. A landlord who managed to charge an initial high rent is therefore placed in a very strong position to perpetuate this initial advantage. However the recoverable rent may, in the course of time, turn out to be unfair to the landlord because of the general inflationary trend². While the landlord should not cheat his

4. Ghana Land Law, op.cit., p.307.

5. *infra*, Chapter 9, pp.334-368.

6. The provisions of Act 220 on the determination and assessment of the recoverable rent has been amended by subsequent legislation. It has, however, been decided to analyse these provisions of Act 220 in some detail because they represent one approach. The subsequent amendments represent another. Rent control, as will be demonstrated, is still a very important policy issue in Ghana. It is therefore important to examine both approaches in some depth.

1. Act 220, S.36.

2. *infra*, pp.363-366.

3. Act 220, S.30.

tenants, it is certainly unfair for a landlord to continue receiving the same rent that was payable in 1960 —twenty years later when the real value of money has plummeted considerably¹.

It may not also be easy to determine the rent which was first or last charged for a particular premises about twenty years ago. This may be because the first tenant may have left the premises and so may a second and a third; so that at the time of letting to subsequent tenants only the landlord is in a position to know what rent was then chargeable. This surely afforded a golden opportunity to landlords and they have not hesitated to take advantage of it².

a. Assessment of the Recoverable Rent

Act 220 therefore provides that the recoverable rent may be assessed — after which the newly - assessed rent becomes the recoverable rent for the

1. See *infra*, pp. 363-366.

2. No landlord has the right to increase the rent payable in respect of any premises without an assessment. By section 25(1)(a) to do so is a crime. Yet one of the commonest complaints made by tenants during the survey was that landlords increased the rent whenever a new tenant moved in. In many houses, the rent paid by tenants renting the same size of room varied - depending on when the premises were let. When this was pointed out to some landlords, they found it difficult to increase rent to take account of inflation because of the personal relationship they have established with their older tenants. With the incoming-tenant they found it easier to charge what they consider to be an economic rent.

premises. The recoverable rent may be assessed under these different circumstances. First, the assessment may arise at the instance of the landlord, tenant or any person interested in the premises.¹ The application is to the Rent Officer who determines the recoverable rent for the premises.² A right of appeal lies to the Rent Magistrate.³

The second type of assessment occurs on the request of the Minister⁴ to the Rent Magistrate.⁵

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1. Act 220, s.5(I)(a) and s.10.
 2. *ibid.* See *infra* pp.266-267 for a discussion of the Rent Officer.
 3. Act 220, s.6(I)(a). See *infra* pp.266-267 for a discussion of the Rent Magistrate. By section 36, the Rent Magistrate is the District Magistrate of the district within which the premises are situated.
 4. The Minister with portfolio for housing.
 5. Act 220, ss.6(I)(c) and II.

The third type of assessment is made by the Minister. He may, by Executive Instrument, assess the recoverable rent in respect of premises of a similar type in similar localities¹. This provision envisaged a more general form of assessment. There is no evidence on record, that this provision was ever made use of.

In assessing the recoverable rent, both the Rent Officer and the Rent Magistrate are obliged to take certain factors into account². These are:

- "(a) the rateable value of the premises for the assessment of rates thereon;
- (b) the value of the land on which such premises are situated;
- (c) the amount of annual rates in respect of such premises and where the premises have been let in part, any apportionment of the rates attributable to such part;
- (d) the recoverable rent assessed for similar premises by the Minister under section 13;
- (e) the estimated cost in respect of repairs or the maintenance of such premises;
- (f) the amount of recoverable rent for like premises;
- (g) the current rate charged by the Ghana Commercial Bank on overdrafts;
- (h) the obligations of the landlord, tenant or any person interested in the premises under the lease; and
- (i) the justice and merits of each particular case"³.

1. Act 220, S.13.

2. *ibid.*, S.14.

3. *ibid.*, S.14.

Where the recoverable rent for the premises has recently been assessed, an application for assessment may not be entertained except in certain specified circumstances¹. These include case where the circumstances determining the rent of such premises have materially altered since the last assessment; where the last assessment was obtained by fraud, mistake or misrepresentation; where in the last assessment some material evidence was not brought to the attention of the assessing officer; or, where, in the opinion of the Rent Officer, injustice has been done.

An assessment may either raise or reduce the rent previously being charged/paid by the landlord/tenant.²

b. Operation of the Assessment

If the assessed rent was lower than the rent previously being paid, then the assessed rent becomes payable with effect from the end of the month in which the assessment was made³. On the other hand, where an assessment during the currency of a tenancy fixes a rent higher than was previously being paid, the newly-assessed rent is payable only after the landlord has given one month's notice to the tenant of his intention to charge the newly-assessed rent⁴.

1. Act 220, S.10.

2. It must be emphasised that an assessment was not necessary for establishing the recoverable rent. Act 220 contained provisions by which the recoverable rent of all premises in Ghana could be determined. An assessment was only necessary when it was sought to vary this determination.

3. Act 220, S.16 (1).

4. *ibid.*, S.16 (2).

This was a reversal of the principle in Hinnawi v. Bassil¹. In this case the rent payable under a tenancy agreement was increased on assessment. The tenant refused to pay the increased rent—contending that he was only liable to pay the contractual rent. The landlord instituted proceedings to recover arrears of rent and for an order of possession. The majority of the West African Court of Appeal (Granville Sharp and Van Lare JJ.A.) held that the standard rent sets only a maximum limit and that a landlord is free to negotiate to let at a lower rent. In such cases, the contractual rent should be the payable rent; the assessed recoverable rent can only be enforced after the termination or expiry of the tenancy.

It has been argued by some that the principle of Hinnawi v. Bassil perpetrated an injustice against landlords; and that since the tenant took advantage of any reduction in rent payable during the currency of a tenancy, it was inequitable for the landlord to be denied this right if the rent is increased².

Section 16 of Act 220 has been criticised by Bentsi-Enchill³. His main criticism is that the provision is capable of working injustice, and being used as a vehicle of fraud—particularly in the case of tenancies for long periods of time. This is because the assessment may fix rent higher or lower than what the parties have agreed on. The parties not being able to terminate the tenancy, may be forced to pay or receive rent higher or lower than they agreed to. Bentsi-Enchill thus concludes that:

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2. Report of the Committee of Enquiry into the Operation of the Rent Control Ordinance (No.2 of 1952), p.27, para.38; J.K.Frimpong, Towards an Effective Control of Rents of Premises in Ghana, unpublished LL.M. dissertation, Faculty of Law, University of Ghana, 1973; Amah v. Picas (1957) 2 W.A.L.R. 79 per Wilson C.J. at p.81.
 1. (1958) 3 W.A.L.R.495. This case was decided on the provisions of the Rent Control Ordinance (No.2), 1952.
 3. Ghana Land Law, op.cit., pp.304-306.

"From this viewpoint it is possible to say that the Rent Control legislation supplies a handy instrument of fraud by enabling a party to a valid contract to turn round and avail himself of extraneous machinery to alter the contract in his favour and to the detriment of the other party"¹.

Both section 16 and Bentsi-Enchill's criticism of it, seem to lose sight of the fact that in this field of activity the landlord and the tenant do not bargain on an equal footing. A tenant may have to 'agree' to pay a very high rent because of the need for shelter and it is only fair that—if on application the rent is reduced—he should pay the lower rent. A landlord who contracts to receive a certain rent should not be heard to say that the rent is inadequate except in clear cases where, for example, because of a sharp decline in the real value of money due to hyper-inflation² or as a result of improvements to the premises, it is demonstrably unfair for the landlord to be made to continue charging the contractual rent. It is here being argued that the landlord is in such a strong bargaining position that he should be able to take care of himself. The tenant, though—being in a weaker bargaining position—needs the apparatus of the state behind him³.

1. *op.cit.*, p.306.

2. It is not considered appropriate that a landlord should be awarded an increase simply because of 'normal' inflation. Inflation is a fact of life in the present world which everyone has to take into consideration in every transaction.

3. By section 2 of the Rent (Amendment) Decree, 1973 (N.R.C.D.158) and section 2 of the Rent (Amendment) Decree, 1979 (A.F.R.C.D.5)—which repealed N.R.C.D.158—the principle in Hinnawi v. Bassil has been revived.

c. Conclusion

This then was the position of the law from 1963 to 1973. The law had had little or no effect on landlord-tenant relations. Rent was generally considered very high by tenants. There were complaints about the high level of rent. The National Redemption Council—the then government—after some initial attempts at bringing the level of rent down¹, enacted the Rent (Amendment) Decree, 1973² to specify what rent should be payable³. It is to a consideration of the approach of this Decree that we now turn.

II. N.R.C.D.158. (1973-79)

The Decree was passed on the 20th February 1973, and made retroactive to 1st February 1973⁴. The Decree did not apply to the whole of Ghana; it applied only to the cities of Accra, Kumasi and Sekondi - Takoradi⁵. The Decree applied to "residential premises" only⁶. The distinction between residential tenancies and others is particularly difficult to apply because of the peculiarities of the business and trading patterns of Ghana. This is because many people, like traders, bread bakers, kenkey sellers, tailors and seamstresses, carry on their business or part of their business, in the premises where they reside.

1. These included appeals to landlords to reduce rents, an order to tenants to pay only 80% of the rent they had hitherto been paying, and the fixing of standard rents.

2. N.R.C.D.158 (hereafter referred to as N.R.C.D.158).

3. N.R.C.D.158 did not replace the recoverable rent provisions of Act 220. N.R.C.D.158 was of very limited application: See *infra* pp.252-255.

4. N.R.C.D.158, S.10.

5. *ibid.*, S.6 (1) and 2nd Sched. By section 6(2) the Commissioner for Housing had power to extend the operation of the Decree to other parts of Ghana. This power was not exercised until the Decree was repealed.

6. N.R.C.D.158, S.10.

The Decree fixed rigid rents for certain specified premises¹. The specification of rigid rents for particular types of premises is a departure from the policy of Act 220, the parent Act. Under Act 220, rents were controlled but the only general provision was that no rent could be increased without a special assessment of the rent for that premises. N.R.C.D.158 thus marked the introduction of a rigid rent control system in Ghana. The specification of rigid rents was urged on the Kwaku Bonsu Committee; but it was rejected².

N.R.C.D.158 defined "premises" as a single room of the type and size specified in the First Schedule; and, a "tenant" as a person whose income does not exceed ₵1,000.00 per annum and who rents a single room only³.

If, as regards premises covered by the Decree, the rent being paid before the Decree came into force is lower than that specified in the Decree, the tenant shall continue to pay the lower rent⁴. Where the dimensions of the rented premises vary from those specified in the First Schedule, then rent proportionate to that payable for the specified size and type is payable⁵.

1. N.R.C.D.158, S1. Under the First Schedule the specified rent for types of room were as follows:-

Sandcrete or Landcrete:	12ft x 12ft =	₵7.50 per month
" "	12ft x 10ft =	₵6.50 per month
" "	10ft x 10ft =	₵5.50 per month
Iron Sheet	10ft x 10ft =	₵3.50 per month
Wooden or Swish	12ft x 10ft =	₵4.50 per month

2. Report of the Committee of Enquiry into the Operation of the Rent Control Ordinance (No.2 of 1952), op.cit., p.19 para 22.
3. N.R.C.D.158, S.4.
4. N.R.C.D.158, S.2. This revives the principle in Hinnawj v. Bassil (1958) 3 W.A.L.R.495 which was reversed by section 16(2) of Act 220. See supra, pp.248-250.
5. N.R.C.D.158, S.1(2).

The draftsman being aware of possible disagreement between landlord and tenant over the appropriate rent payable in respect of some premises, provided that in such situations the matter should be referred to the Rent Officer by either the landlord, tenant or other interested person¹.

a. Rigid Rent Control

It has been noted that N.R.C.D.158 laid down specified rents for certain types and size of premises; and this was so despite any variations in the material facts of a tenancy. This approach is considered by some as an improvement on the recoverable rent provisions of Act 220². It is argued that specification of rigid rents simplifies the enforcement of the rent control mechanism by enabling each tenant to know what his landlord is entitled to charge.

The approach of the Decree can, however, be questioned³. It tends to be too rigid. *There are a number of different factors which determine the rent of premises. These vary in particular tenancies.* Thus even though two different rooms may fall under a particular type and size specified in the Decree they may not have the same amenities and decoration, they may be on different storeys or in different neighbourhoods, and the agreements might offer varying degrees of security.* It was noted that under Act 220 Rent Officers were required to take a large number of factors—including "the justice and merits of each particular case"⁴—into account when making their assessment⁵. Presumably N.R.C.D.158 took the view that interminable argument about what precisely are "the justice and merits of each particular case" was defeating the purpose of Act 220.

1. N.R.C.D.158, S5(1).

2. See J.K.Frimpong, "The N.R.C. and the Standard Rent",; Legon Observer, (1973) Vol.VIII, No.3, p.57.

3. See G.R.Woodman, "The Recent Rent Control Legislation", Legon Observer, (1973) Vol.VIII, No.9, p.198; Report of the Committee of Enquiry into the Operation of the Rent Control Ordinance, op.cit., p.19 para 22.

4. Act 220, S14(i).

5. supra., pp.245-249.

*. See Woodman, G. R., "How can rents be controlled" (1972) 7 Legon Observer 466, 468.

The force of this criticism—on the fixation of rigid rents—is somewhat diminished in this instance because N.R.C.D.158 was very limited in scope.¹ The Decree applied only if the tenant was a person whose income did not exceed £1,000 per annum and rented a single residential room in Accra, Kumasi or Sekondi-Takoradi. The objective of the Decree was therefore to protect only the poorest tenants renting the simplest accommodation.² This was a departure from the policy of Act 220 not to distinguish between premises used for residential and business purposes, between valuable and less valuable premises, or between rich and poor tenants.

b. Categorisation.

But even in the pursuit of its policy-objective of protecting the lowest-income group among tenants, the provisions of the Decree were far from satisfactory.³ Why should such a tenant rent a single room only if he was to benefit? Why should a low-income tenant who because of his large family is compelled to rent two rooms not benefit while his bachelor colleague who rented only a single room did? The above argument assumed that there is certainty as to what constitutes a single room and also that it would be unproblematic determining whose income does not exceed £1,000 per annum. Both assumptions are not justified. What is a single room? Does it include a verandah or terrace. But, perhaps more importantly because of the concrete context, to

I. S.4.

2. See Woodman, G.R., "The recent rent control legislation", op.cit.

3. For a fuller account of the problems thrown up by the categories established by the Decree, see Woodman, G.R., "The recent rent control legislation", op.cit.

what extent does kitchen and toilet facilities, shared with others, make the premises more than a single room? How does a landlord determine the income of his tenant? What if the tenant is self-employed, would the landlord have to rely on the tenant's word as to what his income is?¹ And what about the tenant whose income *fluctuates* from year to year, being sometimes above and sometimes below £1,000.00 per annum?

Now, to wider jurisprudential issues. The distinction between different classes of cases inevitably makes the law more difficult to apply. As Woodman points out:

"Distinctions always provide room for argument over borderline cases. The law cannot always avoid drawing distinctions, but it is arguable that they should be kept to a minimum"².

Furthermore where the constraints imposed by the law apply to only a narrow group of cases, people will try to prevent their own case from falling into this group.³ In this particular instance, landlords may decide to let double-rooms or whole houses only—they may "compel" a tenant to take more than a single room; or, they may let to tenants earning more than £1,000.00 per annum. Indeed they may remove their premises from the residential sector altogether, and rent for commercial purposes only. The net effect of all these possible responses would be to make things difficult for the low-income tenant that N.R.C.D.158 sought to protect.

1. The self-employed do not normally maintain a written statement of account. In fact one of the foremost problems for a system of direct taxation in Ghana is how best to tax the self-employed. Most of them do not pay direct tax. In recent years governments have sought to fix rigid rates for different classes and types of self-employed. It is thus surprising that this problem was not envisaged by N.R.C.D.158.
2. G.R.Woodman, "The Recent Rent Control Legislation", Legon Observer (1973) Vol.VIII, No.9, p.198 at 199.

3. *ibid.*

III. PRICES AND INCOMES REGULATIONS, 1973, L.T.805

Pursuant to the wide powers conferred on it by the Prices and Incomes Decree, 1972¹, the Prices and Incomes Board has issued the Prices and Incomes Regulations, 1973².

As far as they are relevant³, the regulations provide that no one shall increase the rent for "any premises or land whatsoever" without the authorisation in writing of the Prices and Incomes Board⁴. Where the landlord is letting his premises for the first time, he must get the prior written approval of the Prices and Incomes Board on the rent chargeable⁵. Any rent fixed in breach of these Regulations is expressed to be void⁶. Infringement of the Regulations is also a crime. Upon conviction the offender shall be liable to be imprisoned for a term of up to two years, or a fine of up to ₵3,000, or both⁷.

These regulations are a preposterous and idealistic piece of law-making in an inflationary economy such as the Ghanaian. It is unworkable. The Board would need to have a vast bureaucracy reaching into the remotest village if the regulations are to have any chance of success. As it happens, the Board has only one office; and that is at "State House", Accra. It is ridiculous to suppose that landlords in all parts of Ghana would apply to the Board's office in Accra before increasing rent, or establishing what rent is chargeable⁸. And even if they do, the Board has not the machinery for processing the applications⁹. As it happens not many landlords have heard about the Prices and Incomes Board; and none of the landlords interviewed knew that the Prices and

1. N.R.C.D.119.

2. L.I.805.

3. For a discussion of other parts of the Regulations, see S.K.Date-Bah, "Legislative Control of Freedom of Contract", in Essays in Ghanaian Law, ed. Ekaw-Daniels & Woodman, Faculty of Law, Legon, 1976. The Regulations are just amazing. It seeks to control the prices of any goods and services whatsoever - from prices in the urban supermarket to that charged by the village farmer - in the manner indicated. It represents a most unrealistic attempt to control the prices of all goods and services in an inflationary economy still predominantly controlled by private interests.

4. Reg.2(1).

5. Reg.2.(2).

(cont.)

Incomes Board —at least on paper —has something to do with rents of premises¹.

IV. CONCLUSION

The law had not succeeded in checking rising rents the survey indicated that the average rent for a sandcrete room measuring 12 feet by 12 feet was ₦25.00 per month. It may be recalled that N.R.C.D.158 specified a monthly rent of ₦7.50 for this type and size of room. Most landlords knew that there was legislation on rent control. They however did not know that, in some instances, rigid rents were specified, and were surprised when it was pointed out to them².

The greatest drawback to the rigid rents approach is inflation. The First Schedule was not amended from 1973 to 1979 when N.R.C.D.158 was repealed. Within this period inflation rose from an annual rate of 22.8% in 1974 to 116% in 1979³. From 1976 to 1979 the annual rate of inflation was more than 100% for each year. From 1973 to 1979 therefore, prices in the economy as a whole rose about five times over; and yet landlords were supposed to continue charging the specified rent⁴. It would be argued, that when the law seems so patently ridiculous people think they are "justified" in ignoring it.

6. Reg.5(3).

7. Reg.5(3).

8. Even the more decentralised machinery of Act 220 has been largely ineffective.

9. Even the more decentralised machinery of Act 220 (see *infra*, pp.265-276) has been largely ineffective.

1. The popular misconception was that the Prices and Incomes Board only fixed the prices of manufactured goods.

2. Most felt that the government (that is how it was expressed) was not serious.

3. Budget Statement by Minister of Finance to Parliament, 20th Dec., 1979.

4. It is significant that under A.F.R.C.D.5 which repealed N.R.C.D.158 (see *infra* pp.260) the Minister is given power to specify new rents as and when he deems necessary.

This then was the state of the from 1963 to 1979. Act 220 was the principal enactment on the recoverable rent; it applied to the whole country and to all premises. From 1973, N.R.C.D.158 amended the provisions of Act 220 in a limited number of cases, and applied to the cities only. The Prices and Incomes Regulations applied to the whole country and to all premises, and also attempted to control the level of rents. All these have been largely ineffective.¹ Thus when the A.F.R.C. came to power the rent control game had to be played all over again. One of the few pieces of legislation passed by that caretaker administration is a new Rent Control (Amendment) Decree, 1979, which repealed N.R.C.D.158² and amends Act 220³, and is now the substantive law on what rent is legally chargeable⁴.

V. RENT CONTROL (AMENDMENT) DECREE, 1979 (A.F.R.C.D.5)

a. Applicability

A.F.R.C.D.5 was passed on 20th July, 1979 but made retroactive to 21st June, 1979⁵. Unlike N.R.C.D.158, A.F.R.C.D.5 is general in its application⁶. It applies to the whole of Ghana; there is no limitation as to the location or value of the premises, or to the income of the tenant and how many rooms he rents⁷. Thus—unlike N.R.C.D.158 which amended Act 220 only in the three cities of Accra, Kumasi and Sekond—Takoradi, and even in these cities applied only to the lowest income tenants renting the most simple of accommodation—

1. *infra*, Chapter 9, pp. 334-368.

2. A.F.R.C.D.5, S.12.

3. *ibid*, SS.1 & 8.

4. It is important to note that unlike N.R.C.D.158, A.F.R.C.D.5 applies to the whole country and to all types of residential premises and tenants.

5. A.F.R.C.D.5, S.13.

6. *ibid*, SS.1 & 8.

7. *ibid*. But see s.5 which excludes public housing from the scope of A.F.R.C.D.5.

A.F.R.C.D.5 applies to the whole country, to all types and value of premises, and to all tenants. It therefore completely amends the provisions of Act 220 on the recoverable rent. In this respect, A.F.R.C.D.5 reverts to the policy of Act 220 in applying to the whole country and to all residential premises and tenants¹.

b. Specification of Rent

A.F.R.C.D.5 departs from Act 220, but follows N.R.C.D.158 in specifying rigid rents for different types of premises². It provides that, with the coming into force of the Decree, the rent chargeable for different types of premises in different parts of Ghana shall not exceed the following³:

Type of accommodation and size of room	Location	Rent Payable
1. Sandcrete: One-roomed accommodation with shared amenities (i.e., under multiple occupation) of a size 12ft x 10ft.	(Regional Capitals) i.e. Accra Kumasi Sekondi-Takoradi Cape-Coast Sunyani Koforidua Tamale Bolgatanga Ho Also Tema	₵20.00
2. Sandcrete: One-roomed accommodation with shared amenities (i.e., under multiple occupation) of a size 12ft x 10ft.	Other Areas	₵16.00

1. A.F.R.C.D.5, however, applies to residential premises only, while Act 220 applies to all premises whatever the purpose of the tenancy. It must thus be emphasised that as far as commercial lettings are concerned the provisions of Act 220 on the recoverable rent are still applicable. See supra, pp.237-240, and pp.243-250 also, p.251.
(Cont.)

In the case of rooms whose sizes are different from that quoted above, the rent payable shall be at a rate of 16 pesewas per square foot for premises in the regional capitals and Tema, and 12 pesewas per square foot in the case of premises situated in other parts of Ghana¹.

The Commissioner for Housing may from time to time amend the Schedule to the Decree (the table specifying the rent payable, quoted above) by Legislative Instrument². This is a surprising provision; for it would seem that the Commissioner has power to amend the Schedule without a corresponding power to amend section 1(2) which provides for the rent for sizes of rooms not specified in the Schedule. The two provisions ought to go hand in hand. If the Commissioner, presumably as a result of inflation, deems it necessary to increase the rent payable for rooms specified in the Schedule, then it should follow that the rate for sizes not specified should be increased. It is suggested that section 1(3) is an example of bad draftmanship, and that the Commissioner should not only have the power to amend the Schedule but should also be able to amend section 1(2) otherwise an incongruous situation might be created.

The Decree also specifies the rent payable where the tenant takes a whole house rather than a room or rooms under multiple-occupation.

contd.

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2. A.F.R.C.D.5, SS1 & 8. See *infra*, pp.261-265. For a critique of this approach See *supra*, pp.253-255.
 3. *ibid.*, S1(1) and First Schedule. This section deals only with tenants renting rooms under a system of multiple occupation, i.e., not renting a whole house.
 1. A.F.R.C.D.5, S.1(2).
 2. A.F.R.C.D.5, S.1(3).

By section 8(1) the rent payable for a "two-roomed self-contained terraced house" shall be ₦150.00 per month or 27 pesewas per square foot whichever is lower¹. In the case of a "three-roomed self-contained semi-detached house" the rent shall be ₦175.00 per month or 30 pesewas per square foot whichever is lower². For a "three-roomed self-contained detached house" the rent shall be ₦200.00 per month or 34 pesewas per square foot whichever is lower³.

The above provisions may in the course of time suffer from the worst effects of a rent specification system in an inflationary economy. This is because for no apparent reason the minister is only empowered to amend the Schedule to the Decree⁴. The minister has no power to fix new rents for self-contained houses, but can fix new rents for rooms held under multiple occupation. Rents for self-contained houses may therefore not just fall behind inflation, but also rents of other premises⁵.

By section 8(4) rent for self-contained house of more than three rooms shall be negotiated by the parties. On the face of it, this provision departs from the policy of Act 220 in applying to all premises despite their value. It may be recalled that the Kwaku Bansa Committee recommended that rents of premises in the "luxury class" should not be controlled⁶. This view was, however, rejected by Parliament and Act 220 was made general in application.

1. It is thought that what is meant is bedrooms and not just rooms.

2. A.F.R.C.D.5, S.8(2).

3. *ibid.*, S.8(3).

4. *supra.*, S.1(3).

5. New legislation can, of course, be introduced. Frequent changes in rent control legislation may, however, serve as a disincentive to new construction.

6. Report of the Committee, p.20, para.23.

It is suggested, however, that section 8(4) does not take the rents of premises in the "luxury class" outside the rent control scheme. What section 8(4) does is not to specify rigid rents for this type of premises¹; but this does not take them outside the rent control scheme. By section 8(5) any disagreement between the parties shall be referred to the Rent Officers for determination.³ And section 10 provides that in determining rent for premises not specified in the Decree, the Rent Officers shall have regard to the materials used in the construction of the premises and its situation or location. The major legal difference between premises in the "luxury class" and others is that in the case of premises in the "luxury class" there is no upper limit to the rent which the parties can agree on; the rent control mechanism does not come into play as long as there is agreement between the parties. The contractual rent is the legally payable rent until the matter is referred to a Rent Officer and a new rent is fixed. In the case of other premises however, a contractual rent which is above that specified is not the legally payable rent — to receive such rent constitutes a criminal offence².

It would seem that in drafting the provisions of A.F.R.C.D.5 attention was not given to the provisions of the Prices and Incomes Regulations (L.I.805). A.F.R.C.D.5 does not expressly repeal the provisions of L.I.805 dealing with the rents of premises; it only repeals N.R.C.D.158. And yet the provisions of

1. See *supra*, pp.251-254; and A.F.R.C.D.5, S.8(1)-(3).

2. A.F.R.C.D.5, S.9.

3. See also s.4.

A.F.R.C.D.5 contradict those of L.I.805 in some material respects¹. Thus while the Prices and Incomes Regulations provide that no landlord can charge or increase rent without the prior written approval of the Prices and Incomes Board², section 8(4) of A.F.R.C.D.5 provides that the rent for certain classes of houses shall be that negotiated between the parties³. Furthermore while the Regulations envisage the landlord increasing the rent for the premises with the approval of the Board, A.F.R.C.D.5 does not envisage the landlord increasing rent⁴.

The other important provision of A.F.R.C.D.5 is designed to restrict the rents charged by persons who, having a house on hire-purchase from the Tema Development Corporation, the State Housing Corporation and similar bodies, sublet them⁵. The policy here is to restrict such landlords to 25% on top of their outgoings on the said premises⁶. The 25% is of the sum which the landlord would have paid if no deposit was paid and he had agreed to pay the purchase price of the premises over a period of 25 years⁷. Where the landlord has made extensions or improvements to the premises as originally acquired⁸, the matter shall be referred to the Rent Officer who will determine "a reasonable increase in rent having regard to the extensions and other improvements"⁹. Any person aggrieved by the decision of the Rent Officer may appeal to the Rent Magistrate¹⁰.

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1. Could it be that the legislature shares the popular misconception, noted among members of the public, that the Prices and Incomes Board does not deal with rents of premises?
 2. *supra*, pp.256-257.
 3. *supra*, p.261-262.
 4. In fact by A.F.R.C.D.5, S.2 a tenant is to continue paying the rent he was paying before the Decree came into force, if this is lower than that specified in the Decree.
 5. This policy was started by N.R.C.D.158 to deal with the practice of people who, having taken houses from the public corporations - whose policy is to make houses available as cheaply as possible - sublet at exorbitant rents. In practice most sub-tenants pay rents far above the hire-purchase instalment being paid by the landlord: See West Africa, No.3300, 20/10/80, p.2090.
 6. A.F.R.C.D.5, S.7(1).
 7. *ibid.*, S.6(2).
- (cont.)

A.F.R.C.D.5, like N.R.C.D.158, revives the principle in Hinnawi v. Bassil¹. By section 2 of A.F.R.C.D.5, if the rent payable by the tenant before the Decree came into force is lower than that specified in the Decree, the tenant shall continue to pay the lower rent.

It must be emphasised that the rents specified in A.F.R.C.D.5 are not mandatorily imposed; they are just the upper limits². In theory, a landlord is at liberty to charge a rent lower than that specified in the Decree. Furthermore, unlike N.R.C.D.158 with its detailed provision on the rent payable for different types and sizes of rooms³, A.F.R.C.D.5 does not specify in as much detail the rents for varying sizes and types of rooms and houses⁴. A.F.R.C.D.5 specifies rent for the standard types, and then provides that rents for other premises not specified shall be determined by Rent Officers using the rents specified as an upper limit and a guidem and having regard to the materials used in the construction of the premises and its situation or location⁵. Thus, there is much more scope for the Rent Officers with assessment of rents under A.F.R.C.D.5 than under N.R.C.D.158. The upper limit of rents, though, is fixed — contrary to the policy of Act 220.

8. This is common practice.

9. A.F.R.C.D.5, S.7(1).

10. A.F.R.C.D.5, S.7(2).

1. (1958) 3 W.A.L.R.58, see supra pp.243-250.

2. A.F.R.C.D.5, S.10.

3. See N.R.C.D.158, S.1 & First Schedule; also supra pp.251-252.

4. Compare N.R.C.D.158, S.1, Schedule 1 and A.F.R.C.D.5, SS.1 & 8.

5. A.F.R.C.D.5, S.10.

6. Except self contained houses with more than three bedrooms (see, A.F.R.C.D.5, S.8 (4)).

Any person who demands or receives rent or attempts to eject a tenant for failing to pay rent in excess of that specified in A.F.R.C.D.5 commits a criminal offence¹. Such an offender shall, upon summary conviction, be liable to a fine not exceeding £2,000 or to imprisonment not exceeding two years or both².

D. THE MACHINERY OF RENT CONTROL^{*}

I. THE LAW

a. Rent Officers

On the recommendations of the Kwaku Bonsu Committee, Act 220 abolished the Rent Assessment Committees established by the Rent Control Ordinance, 1952³.

The rent control machinery under Act 220 is pivoted on the assessment of rent by the Rent Officer⁴. The rent officer may perform a wide range of functions⁵. The assessment of rents in the first instance is assigned to him⁶. The rent officer cannot act suo motu; he only acts on an application from the landlord, tenant or other interested person⁷. The rent officer shall also investigate complaints by a landlord in respect of arrears of rent and complaints by the parties to the tenancy on any other matter⁸. He shall investigate and determine any matter relating to the Act referred to him by the minister or rent magistrate⁹. He is charged with the preparation of rent registers and other prescribed documents and information¹⁰; and, shall maintain

1. A.F.R.C.D.5, S.9.

2. *ibid.*, S.9

3. It must be emphasised that the machinery for the control of rents has since 1963, been that established under Act 220. Amendments to Act 220, like N.R.C.D.158 and A.F.R.C.D.5, have only dealt with the recoverable rent; the machinery remains the same.

4. Report of the Committee of Enquiry into the Operation of the Rent Control Ordinance (No.2 of 1952), *op.cit.*, p.23, para.29.

5. *ibid.*

6. Act 220, S.5 (1).

7. *supra*.

8. Act 220, S.5(1)(a); See *supra*, p.246, note 1.

9. *ibid.*, S.5(1)(b).

10. *ibid.*, S.5(1)(c).

11. *ibid.*, S.5(1)(d).

a register of vacant premises and furnish information concerning such premises to prospective tenants¹. Rent Officers may take measures against tenants who have absconded and can obtain an order from the appropriate rent magistrate granting him powers of entry and search². He may examine any person to ascertain whether the Act is being observed, and may prosecute for offences under the Act³.

For the performance of these functions, the rent officer is vested with immense powers⁴. He has power to require the attendance of parties and witnesses, and to examine them on oath⁵. He may also order the discovery, inspection and production of documents⁶; and may enter in order to view or order the inspection of any premises under his consideration⁷. He also has power to call assessors or experts to assist him in his determination⁸; and he may order a landlord or tenant to furnish him with any necessary information⁹.

b. Rent Magistrates

Appeals from decisions of the rent officer lie to the rent magistrate, who is in practice the district magistrate of the locality¹⁰. The rent magistrate may vary the assessment¹¹, or any other determination made by the rent officer¹². The rent magistrate has power to assess the recoverable rent for any premises referred to him by the Minister¹³. His assessment is final, though subject to appeals to the High Court on any question of law¹⁴. The

1. Act 220, S.5(1)(e).
2. *ibid.*, S.5(1)(g).
3. Act 220, S.5(1)(h).
4. Act 220, S.5(2).
5. *ibid.*, S.5(2)(a).
6. *ibid.*, S.5(2)(b).
7. *ibid.*, S.5(2)(c).
8. *ibid.*, S.5(2)(d).
9. *ibid.*, S.5(2)(e).
10. *ibid.*, SS7 & 36.
11. *ibid.*, S.6 (1)(a).
12. *ibid.*, S.6(1)(b).
13. *ibid.*, S.6(1)(c).
14. *ibid.*, S.8.

rent magistrate may order the ejectment of any tenant from premises situated within his jurisdiction¹.

c. Jurisdiction of Rent Officers and Magistrates

The only element in a tenancy agreement which the rent officer and rent magistrate can alter is rent². They may deal with other issues —like arrears of rent, breach of covenant, etc.—but they cannot alter any term of the tenancy agreement. The rent officers and rent magistrates have an omnibus jurisdiction, irrespective of the amount of rent involved, the amount of damages or the value of the premises³. This view of the law has not, however, been unanimously accepted by judges. In Diep v. Kaba⁴, a rent magistrate gave judgment to the landlord for £G618 beings arrears of rent and mesne profits. The tenant appealed to the High Court. Counsel for the landlord applied for leave to enforce the judgment, arguing that the High Court had no jurisdiction to entertain the appeal. After rejecting this submission, Koranteng-Addow J., continued, obiter:

"In this instant case as the quantum of the debt was over and above the jurisdiction of the magistrate court the High Court was the only court of competent jurisdiction to entertain the suit"⁵.

Quite clearly Koranteng-Addow J., thought that the jurisdiction of the rent magistrate is limited to the jurisdiction of a district magistrate, i.e., to cases where the amount of money involved does not exceed £G150⁶.

1. Act 220, s.6(1)(d).

2. ibid., ss.5(4) and 9(2).

3. Act 220, ss.5 & 6.

4. [1973] 2 G.L.R.190.

5. ibid., at p.193.

6. Courts Act, 1960 (C.A.9), S.52.

Koranteng-Addow's view on the jurisdiction of rent officers and rent magistrates was rejected in Woode v. Dadson¹. In this case, the rent magistrate on the basis of findings by the rent officer, ordered a tenant to pay ₵10,250 as arrears of rent. The tenant appealed against this decision to the High Court. The main issue for the determination of the High Court was whether the rent magistrate had jurisdiction to award arrears of rent of ₵10,250.00². It was held by Edusei J., that the jurisdiction of the rent magistrate is not limited to a specific sum of money. The learned judge pointed out that by section 37(1)(d) of the Courts Act, 1971³ the District Court Grade I was vested with jurisdiction in "all civil causes or matters relating to the landlord and tenant of any premises or any person interested in such premises as required or authorised by any law relating to landlord and tenant", and that sections 5 and 6 of Act 220 which provide for the jurisdiction of rent officers and rent magistrates did not limit their jurisdiction of rent officers and rent magistrates did not limit their jurisdiction.

It is submitted that Edusei J.'s., view of the law is the law. A more interesting question, however, is whether this ought to be the law? In other words, is it good law? Bentsi-Enchill does not think that it is⁴. He considers it without justification that questions involving large sums of money should be dealt with by rent officers and rent magistrates — particularly since

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1. [1976] 2 G.L.R.185. Unfortunately the earlier opinion of Koranteng-Addow J., was not brought to the attention of the court.
 2. By the Courts Act, 1971 (Act 372), S.37(1)(a) &(b) the general jurisdiction of the District Court Grade I is limited to claims not exceeding ₵2,000.00.
 3. (Act 372).
 4. Ghana Land Law, op.cit., p.307.

their determination is final on questions of fact¹. He argues that this might serve as an incentive to bribery and corruption. He therefore questions the whole philosophy of Act 220 in applying to all premises with no limitation as to value, and asks:

"And this leads to the question whether it would not be better to confine the operations of the Rent Officers to small tenancies where the inducement to corruption is likely to be smaller and where their assistance can be of telling significance"².

Ofori-Boateng is unhappy about the practical operation of this arrangement³. He is particularly concerned because some of the rent magistrates who are given the task of supervising the rent officers are not trained lawyers. He contends that Act 220 envisaged that the rent magistrates would be trained lawyers with experience at the bar so that they can supervise the lay rent officers⁴. He therefore laments the fact that lay rent magistrates are having to supervise lay rent officers. Noting that the effect of this has been that lay rent magistrates have been endorsing the recommendations of rent officers without further enquiry⁵, Ofori-Boateng recommends that only trained lawyers should exercise the supervisory role envisaged by Act 220.

It is, of course, of some concern that untrained rent officers and lay rent magistrates should be vested with so much power, and have jurisdiction

1. Ghana Land Law, op.cit., p.307.

2. *ibid.*, p.306. At p.307 Bentsi-Enchill makes it clear that this question applies equally to the jurisdiction of the rent magistrate.

3. "Rules of Evidence Under Act 220". (1972) 4 R.G.L.43, at p.50.

4. He cites no authority for this contention. The Report of the Kwaku Bonsu Committee upon which Act 220 was passed envisaged no such thing.

5. See, eg., Republic v. Tamakloe; Ex parte Kessie (1968) C.C.90.

in cases involving large sums of money¹. But this drawback should be considered in the wider context². In fact the Kwaku Bonsu Committee examined this issue and reported:

"After considering the nature of the cases to be dealt with and the complaints of landlords and tenants generally, what seems necessary is a system by which a permanent officer deals in the first instance with all rent complaints, trying to settle as many of these as possible and expeditiously where however, parties to any complaint or application are unable to reach agreement before such officer, then the matter would have to go to court. A system such as this would meet the reluctance of both landlords and tenants to go to law on matters affecting rents and will also reduce the number of cases to be dealt with by the magistrates"³.

d. Appeals to the Rent Magistrate

The rent magistrate cannot act suo motu to vary the recoverable rent assessed by the rent officer, but he may so act when there is an appeal to him against decision of a rent officer⁴. A landlord, tenant or other interested person appealing against the decision of the rent officer shall, within ten days of the decision of the rent officer, send a copy of his statement of appeal to the rent officer⁵. Within fourteen days of receipt of the statement, the Rent Officer shall forward the statement together with: (a) copies of all relevant documents certified by him to be the exact copies of the documents; (b) a statement of the facts of the matter, and (c) the reasons for his assessment or other determination⁶. A rent magistrate to whom an

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1. Allegations of corruption against rent officers is not unknown; See The Mirror, 2nd Feb., 1979. There is no record of any such allegation being proved.
 2. A culture in which people are reluctant to go to court with such matters, the expense of legal action and the absence of legal aid.
 3. Report of the Committee of Enquiry into the Operation of the Rent Control Ordinance (No.2 of 1952), op.cit., p.23, para, 29.
 4. Act 220, S.6(1)(a) & (b).
 5. *ibid.*, S.12(1) & (2).
 6. *ibid.*, S.12(2) & (3).

appeal has been made may vary the assessment or determination¹. It is important to note that the rent magistrate cannot vary the assessed recoverable rent unless an application has been lodged with him in the manner described above.

In Re Lokumal & Sons' Application², Adumua-Bossman J.S.C., delivering the judgment of the Supreme Court said:

"It is surely obvious that if an application be not made to a tribunal high or low, within the period of time prescribed by a statutory enactment for submitting the application to it, it will be incompetent for the tribunal to entertain the application after the prescribed period"³.

e. Referrals

It was noted that Ofori-Boateng was concerned about the practice of certain lay magistrates enforcing the recommendations of rent officers without further enquiry⁴. What exactly is the supervisory role envisaged by Act 220 for the rent magistrate? What are the functions of the rent magistrate vis-a-vis the rent officer? By section 5(1)(a) the rent officer has jurisdiction to assess the recoverable rent for premises, and by section 15(a) the rent officer shall issue a certificate specifying the recoverable rent. The rent officer does not need to refer anything to the rent magistrate in this connection.

However by section 5(1)(b) the rent officer is given jurisdiction to investigate other questions like arrears of rent, breach of covenant and ejectment; and in these areas the rent officer is not given the power to make a binding order. By section 6(2) the rent magistrate has jurisdiction to determine any matter referred to him by a rent officer. What then is the rent magistrate supposed to do when the rent officer makes his findings and refers the matter to him?

1. Act 220, S.6.

2. [1962] 2 G.L.R. 53.

3. *ibid.*, at p.56.

4. *supra*, pp.269-270.

There are a number of conflicting judicial decisions on this issue. In Republic v. Accra Rent Magistrate; Ex parte Ofosu-Amaah¹, the tenant applied to the High Court for an order of certiorari to quash an eviction order made by a rent magistrate. The application was based on the grounds that the rent magistrate did not act in accordance with the principles of natural justice in making the order in that: (a) the parties to the suit were not notified to be present; and (b) were not present and were not given an opportunity to be heard when the eviction order was made. Archer J., as he then was, held that even when an issue is referred to the rent magistrate, after an investigation by the rent officer, both parties must be heard. Otherwise the order would have been made contrary to the principles of natural justice². This is also the view taken by Anterkyi J., in Saad v. City Food Supply³, and by Amissah J.A. (sitting as an additional judge of the High Court) in Republic v. Tamakloe; Ex parte Kessie⁴. All these cases decide that when the rent magistrate becomes *seised of* a case from the rent officer, he has to rehear the case or at least listen to submissions before arriving at his decision—to make an order for payment of arrears or a binding order of ejectment. Otherwise his order must be quashed, for he would not have acted judicially.

The above view was rejected by Conssey J., in Bhaqwan v. Thome⁵. In this case the landlord applied to the rent officer to have the tenant ejected. The rent magistrate, acting on the findings of the rent officer, made an order of ejectment. The tenant applied to the High Court for an order of certiorari

1. [1965] G.L.R.613.

2. He, however, found that on the facts of the case natural justice had not been violated.

3. (1967) C.C.33.

4. (1968) C.C.90.

5. (1970) C.C.31.

contrary to the principles of natural justice in not giving him a hearing before making the order. This contention was rejected by Coussey J., who said:

"It is my submission that after the investigation by the rent officer, and he had made his findings as required, then it is imperative that when the time limited for appeal has elapsed, he should forward his investigations and finding to the rent magistrate, who shall make the order for ejection as in this case. The right of appeal on the facts is provided for by the Act. I do not think that when the investigations and finding of the rent officer are forwarded to the rent magistrate . . . the legislature intends that there should be a hearing at that stage . . . I have here, with respect, parted with Mr. Justice Archer in Ex parte Ofose-Amaah"¹.

Where judges of co-ordinate jurisdiction disagree on the law², in our system of jurisprudence, based on the principle of stare decisis, the hope is that the highest court of the land will soon hand down an authoritative decision to end the controversy and to ensure a measure of certainty in the law.

It is suggested that the opinion of Coussey J., is the better one. The other decisions^{hold} that it is contrary to natural justice for the rent magistrate to come to a legal conclusion from facts which both parties have had the chance to challenge and had in fact readjusted on oath through both cross-examination and re-examination; facts the aggrieved party has had a chance to challenge on appeal, but did not do. A re-hearing under such circumstances would be giving an unwarranted indulgence to persons who sit on their rights.³ It is not a breach of the principles of natural justice for an officer who is required to act judicially to make an investigation and then make a recommendation which is not binding until confirmed by a higher tribunal.

1. Bhagwan v. Thome (1970) C.C.31.

2. The disagreement is further evidenced by two recent decisions of the High Court: Sackey v. Kumah [1978] G.L.R.361 and Tackie v. Bannerman (unreported)

3. See Ofori-Boatang, ., 'Rules of evidence under Act 220, *op.cit.*

It is not being advocated that a rent magistrate to whom a matter is referred should not act judicially. He must act judicially; but it cannot properly be said that a rent magistrate has not acted judicially because he made an order without re-hearing the case and calling evidence. A rent magistrate must have a record of the proceedings before the rent officer so as to be able to determine judicially whether the findings of the rent officer is supported by the facts. In Ex parte Kessie¹, the rent magistrate did not have a record of the proceedings before the rent officer (in fact, the rent officer made no record of the evidence), but relied solely on a note by the rent officer specifying what order he wanted made. Amissah J.A., rightly quashed the decision of the magistrate based on this note. But it is respectfully submitted that the learned judge proceeded on an erroneous ground. The rent magistrate had not acted judicially, but this was not because he had not re-heard the case. It was because the magistrate had not before him the pre-requisites which will enable him to decide the matter judicially.

II. Organisation and Practice

The legal provisions - and some of the decided cases - establishing the rent control machinery have been analysed. The machinery on the ground and how it functions (or does not function) is now examined.

Physical organization of rent offices

Act 220 envisaged a largely decentralised machinery for the enforcement of rent control so that landlord/tenant can be settled expeditiously². In practice the machinery is not so decentralised. There is only one rent office each in Cape-Coast, Sekondi-Takoradi, Kumasi and Accra. There are about 1,000,000 people in Accra^{and} about 500,000 in Kumasi. The office in Accra is housed in a temporary - looking wooden structure situated in the centre of the city. All the offices have no library facilities.

1. op.cit.

2. Report of the Committee of Enquiry into the Operation of the Rent Control Ordinance (No.2), 1952, op.cit., p.23, para.29.

This is contrasted with the court system in Accra. There are magistrate courts in Labadi, Teshie, Nungua, Osu, Mamprobi, Kaneshie and Accra Newtown. In addition to the magistrate courts there are circuit courts, the High Court, the Court of Appeal and the Supreme Court. And yet the reason for the establishment of rent officers, and vesting them with the wide jurisdiction and power noted was to bring justice nearer to the people and to engender local participation in and identification with the process¹.

The situation described for Accra prevails in other parts of the country. In fact rent offices have been established in only the regional capitals and the large urban towns. The rest have no rent offices².

a. Personnel and function

There are only some few rent officers. There is one rent officer in Cape Coast for a population of 51,653, one in Sekondi-Takoradi for a population of about 100,000, one rent officer and three assistants³ in Kumasi for a population of about half million³. In fact Ofori-Boateng thinks that the limited number of rent officers is largely responsible for the ineffectiveness of the rent control scheme⁴. The Rent Commissioner who was to be charged with the general administration of the scheme⁵, has never been appointed. There are no research officers, just some typists and some messengers.

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1. Report of the Committee of Enquiry into the operation of the Rent Control Ordinance (No.2), 1952, op.cit., p.23, para.29.
 2. The present writer visited Ada-Foah during his fieldwork, and there is no rent officer.
 3. Unfortunately the figures for Accra have been mislaid. It is, however, unlikely to be much different.
 4. "Rules of evidence under Act 220", (1972) 4 R.G.L.43 at 50.
 5. Act 220, S.2.

It was noted that the rent offices and the rent officers envisaged by Act 220 were to be more than rent assessment bureaux; they were also expected to serve as housing agencies which will provide facilities — information and assistance — to prospective landlords and tenants¹. Such a service would have been immensely beneficial to landlords and tenants. The rent officers were to offer technical advice concerning available accommodation, suitable conditions and rents in respect of particular premises. This service is not being provided by rent officers. Investigation by the present writer at rent offices in Accra and Kumasi indicated that rent officers do not provide this service. This was hardly surprising considering the physical conditions and the resources with which they work. The rent offices do not have the resources and the personnel with which to handle this type of operation. Act 220 gives no indication on how rent officers were to get information about available accommodation. It certainly would be wishful thinking to expect landlords to furnish rent offices with such information since they would then be compelled (at least officially) to let at the recoverable rent. But rent offices have no officers in the field collecting such information. In any event, considering the concrete housing situation, few landlords need the services of the rent office in advertising vacancies.

1. *supra*, pp. 265-266.

E. CONCLUSION

This then has been the law since 1963. It has been largely ineffective¹. As far back as 1957 the United Nations Technical Assistance Programme team reported:

"Though rent controls in the Gold Coast are all - embracing and drastic on paper, covering old property, new property and even commercial premises, they are being honoured more in the breach than in observance. This applies to the requirement of the filing of first rents, to the enforcement of sanctions against recalcitrant landlords who deprive dissident tenants of essential services, to those who take key money surreptitiously and to those who shun repairs, put out tenants' belongings or raise rents to unconscionable levels. The office charged with enforcing this law is staffed by a skeleton force hardly equipped to enforce a single phase, much less all of the law"².

When the present writer carried out field investigation between July - December 1978, the average rent for a sandcrete room in a multi-occupational dwelling in Accra was ₵25.00 per month³. The average rent for a three bedroom self-contained house in Accra and Kumasi was ₵500 per month⁴. Huge sums of money are demanded in advance as a condition for the grant of a tenancy⁵. The present writer has not been to Ghana since the enactment of A.F.R.C.D.5, but it is doubtful whether it has fared any better than its predecessors⁶. An item in a recent issue of West Africa confirms this

1. See Frimpong, J.K.; Towards an Effective Control of Rents of Premises in Ghana, op.cit., ; Date-Bah, S.K., "Legislative control of freedom of contract", op.cit.

2. Housing in Ghana, op.cit., p.40, para.141.

3. This was at a time when N.R.C.D.158 was in force and stipulated a rent of ₵7.50 for this type of premises.

4. It can thus be seen that the level of rent at the time of the enquiry is double that stipulated now by A.F.R.C.D.5

5. supra, pp.240-243.

6. Reports gathered from newspapers (see Daily Graphic, 21 June 1979) and friends in Ghana indicate that in the heyday of the A.F.R.C. 'revolution'

suspicion¹. It reported the Managing Director of Tema Development Corporation as saying that a lady who had eight T.D.C. houses was charging rents of £300 - £400 per annum for each house when the official rent² was £20 - £30.

It is argued by some that the failure of the rent control scheme has *been due to the very poor manner in which it has* been administered³. While not disputing that the scheme has been ineptly administered, it is submitted that the failure of the scheme and other aspects of residential tenancy law raises more fundamental questions about the functioning of residential tenancy law in the concrete socio-economic context of Ghana. It raises questions about socially-transforming laws and Ghanaian society. The inefficient administration of the rent control scheme is only a symptom of a more deep-seated malaise. Residential tenancy law (and in some respects other aspects of law) have to be analysed in the political economy of Ghana if the diagnosis is to be scientific⁴.

the level of rents fell. But more recent reports indicate that the revolutionary fervour having subsided things have gone back to square one. The full significance of this development is analysed below, pp.346-366.

1. No.3300, 20th Oct., 1980, p.2090.
2. By A.F.R.C.D.5, S.6 she could not charge more than 25% on top of her monthly outgoings as monthly rent, i.e., if she had not made extensions to the property.
3. Ofori-Boateng, J., "Rules of evidence under Act 220", op.cit., pp.49-51; Frimpong, J.K., "The N.R.C. and the standard rent", op.cit.
4. See chapter 1, pp.47-56 and chapter 9, pp.334-368.

CHAPTER EIGHT

SECURITY OF TENURE

"In the past, the tempo of social change was very much less rapid than it is today and it cannot be assumed that the 'lawyers' law' will always remain a prerogative of the professional lawyer, a backwater removed from urgent social and political problems"¹.

Introduction

The security of tenure enjoyed by the tenant, or the circumstances in which the landlord ought to be able to evict his tenant and recover possession of the premises is one such area of law which has today become an urgent question of political economy. As man's struggle for shelter in an urbanizing world has defied human ingenuity, the urgency of the problem has intensified.

But, to introduce a measure of historical perspective to the whole debate and to explode the myth that restrictions on the rights of landlords is the preoccupation of patronizing, paternalistic and socialistic busy-bodies, it may be pointed out that one of the earliest developments of this branch of the law was that equity was prepared to grant relief from forfeiture, at least for non-payment of rent².

The policy - issues raised by rent control generally have already been discussed³. In the specific instance of security of tenure, the policy objections raised by the critics have been premised on laissez faire notions of private property rights and freedom of contract. It goes like this: "a man must have a right to do as he pleases with his own house. If he contracts to let the house that is his business. Once the contract ends he must be able to recover his house. The government/state/public/society has no right

1. Friedman, W., Law in a Changing Society, London, 1972, pp.51-52.

2. *infra*, pp.300-302.

3. *supra*, pp.23/-243.

to force him to keep a tenant if he does not want to. If society thinks that the tenant needs to be housed, that is society's responsibility".

This argument (or variants of it) have been analysed at various points of the essay. It has been pointed out that long before the Rent Acts were dreamed up equity was vigorously restricting the enforcement of common-law rights.¹ It has also been argued that contract is no longer a private and individual affair, but that in most case—including residential tenancies—it is a social institution.² It has also been argued that the objective facts of the housing situation in urban Ghana do not allow for freedom of contract theorising.³ Moreover, in the present economic situation, public housing on a large enough scale is not possible. In addition, and perhaps crucially, the very notion of sacred private property rights is, in the concrete Ghanaian context, misplaced. The cocoa farmer, goldminer or timber planter—with the help of multifarious clerks, agencies, boards, etc., (some, no doubt, unnecessary) exports the produce of his labour. From this the country derives scarce foreign exchange to import cement, machinery, roofing sheets, iron, etc., (or raw materials for their production) and also provides free education, free medical care, etc. These building materials are then used (bought, admittedly) by someone to build a house. The landlord relied on society to build the house, and he continues to live in a society. To argue that the landlord be left to do as he pleases borders on the obscene.

1. See *infra*, pp. 300-302.

2. *supra*, pp. 170-171.

3. *ibid.*

Section 17 of Act 220 regulates and restricts the landlord's common-law right of recovery of possession, and protects the tenant against unlawful eviction from rented premises¹. But, it has consistently been held by the Ghanaian courts that before a landlord can bring his claim within section 17 of Act 220 he must have a common-law right to terminate the tenancy. The common-law rules for the termination of tenancies are, therefore, first considered.

A. The Termination of Tenancies

I. Effluxion of time.

At common law a tenancy for a fixed (?) term determines automatically on the expiration of the definite period. Hence a tenancy for a fixed term of five years created on 1st October 1979, would determine automatically immediately after 30th September 1984. The tenancy is said to determine automatically because there is no requirement that notice be served by either party. It is, however, important to note that though a tenancy may have expired at common law, a landlord legally³ cannot recover possession solely on the ground of expiration of the stated period⁴. But it is not correct to assert—as indeed Kludze does⁵—that the duration of a tenancy is no longer of any consequence, and that:

"... a tenant who takes a ten-year lease would be in the same position as a tenant who agrees on a two-year lease"⁶.

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1. Ramia v. Mouissie (1945), D.C.(Land) 38-247, 177 (decided on the basis of the Rent Restriction Regulations, 1943); Moubarak v. Eguakun (1956) 1 W.A.L.R.88 (decided on the basis of the Rent Control Ordinance (No.2), 1952; *infra*, pp.307-312).
 2. *ibid.*, Bassil v. Said Rqad (1958) 3 W.A.L.R.231 (decided on the basis of similar provisions in the Rent Control Ordinance (No.2), 1952).
 3. He may succeed in effectively, albeit illegally, evicting the tenant.
 4. Bassil v. Sfarijlani (1967) C.C.20; Karam & Sons v. Traboulsi [1964] G.L.R.513.
 5. Kludze, A.K.P., "The termination of leases", (1975) 7R.G.L.10, at p.32.
 6. *ibid.*

It has consistently been held by the courts that section 17 of Act 220 only restricts and does not enlarge the landlord's power of recovery of possession¹. The landlord cannot recover possession merely by establishing one of the conditions specified in section 17 of Act 220². In addition the landlord has to show that he is entitled to possession under the common law³. This, as Woodman points out,⁴ is why the duration of a tenancy is still important; for once the tenancy has determined by the effluxion of time only section 17 of Act 220 protects the tenant from eviction.

A tenancy for a definite (?) period may, however, be made determinable on the occurrence of a contingency within the period, such as death. At common law this will result in the earlier determination of the tenancy.

II. Surrender

When a tenant surrenders his tenancy to his immediate landlord, who accepts the surrender, the tenancy merges in the landlord's reversion and is determined⁵. Surrender has been defined as the:

"... yielding up of an estate for life or years to him that hath an immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutual agreement between them"⁶.

It is clear from the definition that the surrender must be to the immediate landlord; the transfer of the tenancy to a superior landlord does not effect a surrender but operates merely as an assignment of the lease.

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1. Ramia v. Moufssie, op.cit.,; Moubarak v. Eguakun, op.cit; Bassil v. Said Rqad, op.cit.
 2. *ibid.*
 3. *ibid.*
 4. Woodman, G.R., "In defence of section 17 of the Rent Act (Act 220)", (1975) 7R.G.L.144.
 5. See Asafu-Adjaye v. Abboud (1970) C.C.45 (This was a case involving land)
 6. Co.Litt.377^b.

The surrender of a joint tenancy is not effective unless made by all the tenants¹.

Surrender may be either express or by operation of law.

a. Express surrender

The express surrender of a tenancy of a period of more than three years must be in writing and signed by the tenant or his agent duly authorised in writing². A tenancy for a period not exceeding three years may be surrendered orally if the transfer takes effect in possession³. A contract to surrender must be evidenced in writing and signed by the tenant or his agent⁴. But an oral surrender made for value and supported by a sufficient act of part performance would be effective in equity as a surrender⁵.

b. Surrender by operation of law

Surrender by operation of law rests on the principle of estoppel. It requires some act by the parties evidencing an intention to terminate the tenancy. In such circumstances the requirement of writing is dispensed with⁶. Surrender by operation of law will take place if the tenant accepts a fresh (and valid) tenancy from his immediate reversioner⁷, or where it is agreed that the duration of the tenancy shall be extended thereby creating a new tenancy.

c. Surrender and sub-tenants

The voluntary surrender by a tenant per se does not extinguish a sub-tenancy or prejudice the rights of a sub-tenant; but the landlord can take

1. See Nyame v. Ansah (1970) C.C.99, a case involving land, where the law was thus stated by Edusei J. :

"In the absence of express authority it was not competent for one of two joint tenants to surrender rights jointly held by them".

2. Conveyancing Decree, 1973 (N.R.C.D.175), S.1(1).

3. *ibid.*, S.3(1)(f).

4. *ibid.*, S.2(a).

5. *ibid.*, S.3(2).

6. *ibid.*, S.3(2).

7. See Asafu-Adjaye v. Abboud (1970) C.C.45.

regular steps to determine the sub-tenancy. In Karam v. Ashkar¹, the head-tenant granted a sub-tenancy of part of the premises. In breach of the head-lease the sub-lessor/head-tenant ceased paying rent. Later the sub-lessor voluntarily executed a deed of surrender in favour of the head-lessor. It was held by the Supreme Court that the mere surrender of the head-lease by the sub-lessor did not operate to dispossess the sub-tenant of his subsidiary interest.

Surrender by a head-tenant would be subject to any equities. At common law this meant that a sub-tenant would be liable for arrears of rent due on the head-lease². In Karam v. Ashkar, the facts of which have been already noted, the sub-tenant was held liable for all the arrears of rent due on the head-lease — notwithstanding that he occupied only a portion of the premises³. This was a monstrous state of affairs, though the sub-tenant was entitled to recoup himself from his landlord/head-tenant. Fortunately, this is no longer the position in Ghana; section 23(2) of the Conveyancing Decree, 1973 (N.R.C.D.175) expressly exempts the sub-tenant from liability for payment of rent reserved under the head-lease.

III. Notice to Quit

A tenancy for a fixed term cannot be determined by notice unless this is expressly provided for in the tenancy agreement⁴. Thus a tenancy for a substantial term often contains provisions enabling the tenant to determine it sometime during the course of the tenancy agreement. In Savage v. G.I.H.O.C.⁵, premises were let by the landlord for a term of fifteen years

1. [1963] 1 G.L.R.138.

2. See Webber v. Smith (1689) 2 Vern.103.

3. *supra*, at p.145.

4. See Savage v. G.I.H.O.C. [1973] 2 G.L.R.242.

5. [1973] 2 G.L.R.242.

with an option to the tenants to determine the tenancy on the expiration of the first eight years after giving six months' notice of their intention to do so. After less than a year the tenants vacated the premises. In an action by the landlord for arrears of rent and for general damages, it was held that the tenancy had not been terminated because the notice to terminate the tenancy was not in accordance with the provisions of the lease. The law was thus stated by Edusei J.,:

"... there were two ways in which the lease ... could have been terminated: either (a) by effluxion or (b) by notice to quit ... As a general rule there is no need for a notice to quit in the case of a lease for a definite term ... since the tenancy terminates automatically upon expiration of the agreed term. The other way is by notice to quit as stipulated ..."¹.

Since a notice to quit is a unilateral act performed in the exercise of a contractual right, it must conform strictly to the terms of the contract; and the onus of proving its validity lies on the party giving it. In Monta v. Paterson Simons², premises were demised to the tenant by a deed dated 1st December 1960, for a fifteen-year term. However, the deed gave the tenant the option to determine the lease "at the expiration" of the first ten years provided he gave six months' written notice of their intention to do so. On 14th May, 1970 the tenant served a written notice on the landlord signifying his intention to determine the lease as from 1st December, 1970. The landlord started proceedings to determine the validity of the notice, contending that on a proper construction of the deed the notice could only be given to

1. *Supra*, p.247.

2. [1974] 2 G.L.R.162.

take effect—at the earliest—six months after the expiration of the first ten years. This contention was rejected by Mensa-Boison J., who held that a tenancy determinable "at the expiration" of a specified date, might be determined exactly at the end of the specific period; it is where a tenancy is made determinable "on or after" a specified date that the notice could be given only after the expiration of the period certain.

a. Periodic tenancies

A periodic tenancy, in contrast with a fixed-term tenancy does not expire with the effluxion of time; it will continue indefinitely—from period to period—until determined by the service of an appropriate notice to quit by one of the parties.

The parties are free to stipulate their own provisions for the service of notices to quit; but in the absence of any express stipulation, the common-law rules—suitably modified to suit Ghanaian conditions¹—will apply². The parties cannot agree on any terms which would be repugnant to the nature of the tenancy. Thus a stipulation that one party may not give a notice to quit is void³; for it is an incident of a periodic tenancy that it is terminable by either party.

1. Yearly tenancies

At common law a tenancy from year to year is determined by at least six months' notice⁴. At English law the notice must expire at the end of a completed year⁵. This means that if a tenancy from year to year commenced on 1st September, a notice to terminate it must be given at the latest 1st March to expire on 31st August. A half-year's notice not expiring on a completed year of the tenancy is not good notice.

1. See Allamedine Bros v. P.Z. [1971] 2 G.L.R.403.

2. Ramia v. Mouissie (1945) D.C.(Land) 3847, 177.

3. See Gray v. Spy[1922]922] 2 Ch.22

4. See Sidebotham v. Holland [1895] 1 Q.B.378.

5. See Sidebotham v. Holland, *ibid.*

2. Other periodic tenancies

At common law, the length of notice required to terminate a periodic tenancy other than a yearly tenancy, is a full period's notice.¹ At English law such notices must expire at the end of the period in question.²

3. Allamedine Bros. v. P.Z.³

The technical English-law rules on the service of notices to quit may not be wholly applicable in Ghana. They may have to be suitably modified to suit Ghanaian conditions. This is the import of the unanimous opinion of the Court of Appeal in Allamedine Bros. v. P.Z. In this case, counsel for the tenant had argued that since the notice purporting to determine a monthly tenancy did not expire with the periodic month (as required by English law) the tenancy had not been terminated. This contention was rejected by the court. Delivering the refreshing unanimous decision of the court Sowah J.A. said that the English-law rules ;

"....were developments suitable to English experience and circumstances and may not necessarily be ideal"⁴.

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- I. Ramia v. Mouissie (1945) D.C. (Land) '38-'47, 177; Allamedine Bros. v. P.Z. 1971 2 G.L.R. 403.
 2. See Precious v. Reddie [1924] 2 K.B. 149.
 3. op. cit.
 4. op. cit., 409.

Guided by section 23(2) of the Interpretation Act, 1960¹—which defines a period by reference to the calendar²—and strengthened in the knowledge that there is no Ghanaian authority in support of the English-law rule, Sowah J.A., proceeded to posit the concrete circumstances which call for a modification of the English-law rules. In Ghana, said the learned justice of appeal:

"the bulk of tenancies concern monthly tenancies and a majority of such tenants are liable to be transferred from their stations at fairly short notice. I think these should be able to give notice of their intention to terminate their tenancies at any time during the month provided they give notice calculated on the basis of section 23(2) of the Interpretation Act. There must however be reciprocity or mutuality on this matter, namely, that landlords must be entitled to give notice on similar basis"³.

1. C.A.4.

2. The Interpretation Act, 1960 (C.A.4), S.23(2) reads:

"If the period indicated in the enactment begins on a date other than the first day of any of the twelve months of the calendar it is to be reckoned from the date which it is to begin to the date in the next month numerically corresponding, less one, or, if there is no corresponding date, to the last of that month.

For example: a month beginning on 15th January ends on 14th February; a month beginning 31st January ends on 28th February (or 29th February in a leap year)".

The Act applies only in the interpretation of statutes.

3. Allamedine Bros. v. P.Z. [1971] 2 G.L.R.403, 410.

Allamedine Bros. v. P.Z. involved a monthly tenancy; but from the reasoning of the Court of Appeal, it is submitted, the opinion¹ of the court is not limited to monthly tenancies. It applies to all periodic tenancies. The technical English-law rules on the adequacy and expiration of notices to quit may not, therefore, apply in ^{all} their rigidity to Ghana. The English-law rules may be suitably modified at every instance to suit the concrete realities of the Ghanaian context.

2. Mode of service.

Unless otherwise provided for in a tenancy agreement, section 39 of the Conveyancing Decree, 1973, stipulates that a notice to quit must be in writing. A notice by the landlord shall be sufficiently served on the tenant if left addressed to him on the premises, or sent to him by registered mail, or left at his last known address in Ghana². Notice by the tenant shall be sufficiently served if delivered to the landlord personally, or sent to him by registered mail, or left at his last known address in Ghana³.

IV. Frustration

Under normal contract law principles, if a contract becomes incapable of performance due to unforeseen events or through no fault of either party, both parties are discharged from their contractual obligations⁴. The performance of the contract is said to have been frustrated—the whole basis of the contract having been destroyed⁵. In Taylor v. Caldwell⁶, the plaintiff agreed to let out a music hall for four days for the express purpose of it being used for giving concerts and fetes. The music hall was burnt down

2. Conveyancing Decree, 1973, (N.R.C.D.175), S.39.

3. *ibid.*

4. See Cheshire & Fifoot, The Law of Contract 9th (ed.), London, 1976, 544-548.

5. See Krell v. Henry [1903] 2 K.B.740; Appleby v. Myers (1867) L.R. 2 C.P.651.

6. (1863) 33 & S.826.

before the performances could start. It was held that the plaintiff was not entitled to damages because performance of the contract has been frustrated; and that both parties should be relieved from their contractual obligations.

In English law a controversial question that is still undecided by the House of Lords is whether the doctrine of frustration can be applied to a tenancy¹. There is no consensus of opinion among leading academic and judicial authorities in England on whether frustration applies to tenancies or not.

The view that has so far prevailed in England—at least at the lower courts—is that the doctrine of frustration does not apply to tenancies². This is based on the theory that a tenancy creates not merely a contract but also an estate in land³. The "estate concept" argument is this⁴. "A contract is frustrated when the venture cannot be carried out. But in the case of a tenancy the venture contemplated by the parties is the transfer of an estate to the tenant. The contractual obligations are but incidental to this transfer, and, even if some of them become impossible of performance this does not affect the continuance of the estate. The foundation of the agreement is the creation of the estate, and so long as the foundation exists there is no frustration". Lush J., epitomised this view when he said:

"It is not correct to speak of this tenancy agreement as a contract and nothing more. A term of years was created by it and vested in the appellant tenant."⁵.

1. There is no Ghanaian case on the issue.

2. Paradine v. Jane (1647) Aleyn 26; Ma they v. Curling [1922] 2 A.C.180; Swift v. Macbean [1942] 1 K.B.375; Denman v. Brise [1949] 1 K.B.22.

3. See Evans, The Law of Landlord and Tenant, London, 1974, p.188; Woodfall, The Law of Landlord and Tenant, 28th (ed.), London, 1978, pp.312-313, 927-928.

4. *ibid.*

5. London and Northern Estates Co. v. Schelesinger [1916] 1 K.B.20, at 24.

This traditional view has, however, not gone unchallenged. It was first questioned by Atkin L.J., (as he then was) in Mathey v. Curling¹, and has been challenged by some academic writers².

Opinion in the House of Lords is divided. In Cricklewood Property and Investment Trust, Ltd. v. Leighton's Investment Trust, Ltd.³, Lord Russell and Lord Goddard took the view that the doctrine of frustration cannot apply to a demise of real property. Relying on the "estate-concept" argument, Lord Goddard said:

"In the case of a lease, the foundation of the agreement is that the landlord parts with his interest in the demised property for a term of years, which thereupon becomes vested in the tenant, in return for a rent. So long as the interest remains in the tenant, there is no frustration, though particular use may be prevented"⁴.

This last way of stating the law has been criticised by Lord Simon as coming perilously near to arguing in a circle, for why should frustration be excluded merely because the foundation happens to be the transfer of an estate?⁵ In his view there is no difficulty in applying the doctrine of frustration to tenancies⁶. Lord Wright took the view that the doctrine of frustration is modern and flexible and ought not to be restricted by an arbitrary dogma⁷.

1. [1922] 2 A.C.180, at 193-194.

2. Yahuda, S., "Frustration and the chattel interest" (1958) 21 M.L.R.637; Williams, G., "The Coronation cases" (1941) 4 M.L.R.248.

3. [1945] A.C.221.

4. *ibid.*, at p.245.

5. *ibid.*, at p.229.

6. *ibid.*

7. [1945] A.C.221, at p.241.

Lord Porter expressed no opinion on the matter. The result of these conflicting dicta is that until the House of Lords resolves the issue, the position in England—at least in the lower courts—is that the doctrine is excluded in the case of a tenancy.

The English law position may not have been inappropriate at the time and in the circumstances in which it developed—an agricultural tenancy primarily concerned with land as a factor of production. But this is far removed from the realities of the residential tenancy relationship in modern Ghana¹. The residential tenancy relationship is today a facilitative institution for the provision and use of that package of goods and services called housing. The modern residential tenancy has nothing to do with land as a factor of production. The provision and use of housing are the raison d'être of the arrangement. It is therefore suggested, that if through no fault of either party, the provision and use of that commodity are made impossible — such as, through the premises being destroyed, requisitioned or burnt down, or the tenant dying or having to go to war²—performance of the tenancy should be considered as having been frustrated and the parties should be relieved of their obligations.

V. Forfeiture

The landlord may become entitled to re-take the premises, and so determine the tenancy, either under the terms of the tenancy agreement or by operation of law. This is known as the landlord's right of forfeiture, or of re-entry. A tenancy is subject to forfeiture only if there is some provision to that effect in the tenancy agreement³. Every tenancy agreement confers rights

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1. This is the case with residential tenancies in urban conditions and it is surprising that the common law has not developed new rules to deal with urban residential tenancies but has continued to treat it as part of the general law of landlord and tenant.
 2. In all these situations the English courts will hold that performance of the tenancy has not been frustrated; see Whitehall Court Ltd. v. Ettlinger [1920] 1 K.B.680; Ma they v. Curling, op.cit., Paradine v. Jane, op.cit.; Denman v. Brise, op.cit.

(Cont.)

and imposes obligations on both landlord and tenant. Where these are framed as covenants¹, the landlord has no right to determine the tenancy, if the tenant breaks any of his covenants, unless the agreement contains an express provision for forfeiture on breach of the covenant².

In Sackey v. Ashong³, the tenant covenanted to repair the premises; but the covenant was not fortified by a forfeiture clause. In an action by the landlord to recover possession because of the tenant's alleged breach of the covenant to repair, it was held by the West African Court of Appeal, that in the absence of express provision, breach of a covenant of repair does not give a right of re-entry to the landlord.

The tenant's obligation may however be expressed as a condition for the grant or continuance of the tenancy⁴. In this case the tenancy becomes liable to forfeiture if the condition is broken, even if there is no forfeiture clause. The law on the right to forfeit was thus stated by Ollennu J., as he then was, in Bassil v. Said Rqad:

"Now at common law there can be no forfeiture for breach of a covenant under a lease unless there is express provision in the lease for re-entry . . . And where there is a provision for re-entry upon breach, or where the breach is not merely of a covenant but of a condition and therefore forfeiture can attach without express provision for re-entry. . . ." ⁵

3. Ampiah v. G.B.Ollivant (1948) D.C.(Land) 1948-51, 46; Basil v. Said Rqad (1957) 3 W.A.L.R.231.

1. For the distinction between conditions and covenants, see *supra* p.133.

2. *ibid.*, note.3.

3. (1956) 1 W.A.L.R.108.

4. For the distinction between conditions and covenants, see *supra* p.133.

5. (1957) 2 W.A.L.R.231, at p.235.

It is important to note that where a tenant is in breach of a condition or a covenant fortified by a forfeiture clause, the tenancy does not thereby become void, only voidable.¹ The landlord has to take steps to enforce his right.

a. Exercise of the right of re-entry

A landlord who is entitled to re-enter for breach of covenant or condition, must in either case take positive steps to show unequivocally that he intends to determine the tenancy. His right of re-entry is exercisable either by taking possession peacefully or by bringing an action in ejectment.² Notwithstanding the right of re-entry the landlord is not entitled to enter the premises vi et armis and take possession against the wishes of the tenant.³ A landlord can only forfeit the tenancy by entering the whole premises; he cannot do this whilst any portion of the premises is occupied by a tenant, unless he can enforce forfeiture against that particular tenant.⁴ Since a landlord's rent is due from each and every portion of the premises, a right of re-entry can be exercised over the entire premises when there is default of payment of rent by a tenant in respect of a portion of the premises held by him.⁵

b. What amounts to retaking possession?

In Yamak v. Yawson,⁶ a covenant supported by a forfeiture clause was broken by the head-lessee. The head-lessor then served notices on the sub-tenants in the premises asking them not to pay rent to the head-lessee but to pay them to her—the head lessor's—solicitor. In an action challenging validity of this notice, it was contended on behalf of the head-lessee that mere notice to the sub-tenants directing them to pay rent to the head-lessor was not sufficient to constitute re-entry. This contention was rejected by

1. See Quesnel Forks Gold Mining Co. v. Ward 1920 A.C.222.

2. See Karam v. Ashkar [1963] 1 G.L.R.138, at p.144.

3. *ibid.*

4. Karam v. Ashkar [1963] 1 G.L.R.138, at p.145.

5. *ibid.*

6. [1971] 2 G.L.R.465.

Edusei J., who held that the action of the head-lessor amounted to a termination of the head-lease and the grant of a new tenancy to the sub-tenants on the same terms, and that this amounted to a resumption of possession by the head-lessor.

But the mere vacation of the premises would not amount to an exercise of the right of re-entry. In Karam v. Ashkar¹, a landlord with a right of re-entry did not take any steps to enforce his right. Later the head-lessee surrendered the premises. It was held by the Supreme Court that this did not amount to re-entry and therefore that the sub-tenants were not affected. Nor is a notice to quit tantamount to re-entering².

The issue and service of a writ of possession, however, constitutes re-entry; it is conclusive indication that the landlord has irrevocably decided to treat the breach as having determined the tenancy. In Nukpa v. Hunter³, a landlord who had a right of re-entry served a writ for recovery on the tenant, but subsequently accepted rent from him. In an action for recovery of possession, it was held by Cussey J., that the issue and service of a writ of possession is an irrevocable election to enforce the right of re-entry, and that no subsequent act can qualify this position.

It is immaterial that after the issue and service of the writ the case is withdrawn and never dealt with on its merits⁴. In Karam v. Ashkar⁵, a landlord vested with a right of re-entry issued and served a writ of possession on the sub-tenant; but this was subsequently withdrawn in court. It was held that this constituted a sufficient act of re-entry. The law was thus stated by Crabbe J.S.C., delivering the unanimous decision of the Supreme Court:

1. *supra*.

2. Karam v. Ashkar, *supra*, at p.147.

3. (1950) D Ashkar, *supra*, at p.147.

4. See Jones v. Carter (1846) 15 M. & W.718; Moore v. Ullcoasts Mining Co.Ltd. [1908] 1 Ch.575.

5. [1963] 1 G.L.R.138.

"It seems to me that the mere service upon the plaintiff of the writ which contained a demand for possession would operate to determine his sub-lease In my judgment the fact that the action was withdrawn and never dealt with on the merits is immaterial to the question whether the defendant had exercised his undoubted right of re-entry"¹.

c. Waiver

A landlord's right of re-entry may be lost by waiver of the breach grounding the right. Waiver may be express, or implied by some act or conduct by which the landlord may be deemed to have acknowledged continuance of the tenancy. Waiver may be implied if:

- (I) the landlord is aware of the acts or omissions of the tenant which make the tenancy liable for forfeiture, and
- (II) the landlord does some unequivocal act recognising the continued existence of the tenancy.

Both elements must be present to constitute waiver; it is not enough merely for the landlord to know that the tenant is in breach. A positive act of the landlord is necessary for it to amount to waiver; a merely passive attitude in the landlord will not suffice².

Demand and/or acceptance of rent is the act most frequently relied on from which waiver may be inferred. In Bassil v. Siad Road³, the law was thus stated by Ollennu J., :

"Moreover the evidence shows that the plaintiff has been receiving rent with full knowledge of the breach. He is therefore deemed in law to have waived the breach and he cannot, therefore, be entitled to recover possession"⁴.

1. *supra*, at pp.147-148.

2. See Perry v. Davis (1858) 3 C.B.(N.S.) 769; Matthews v. Smallwood [1910] 1 Ch.777 at 786.

3. (1957) 2 W.A.L.R.231.

4. *supra*, at p.235.

Demand and/or acceptance of rent, and any subsequent act of the landlord will not, however, amount to waiver if done after the landlord has exhibited his final and unequivocal decision to treat the tenancy as having determined. In Nukpa v. Hunter¹, the landlord issued and served a writ of possession on a tenant who was in breach of a covenant supported by a forfeiture clause. Subsequently the tenant tendered and the landlord accepted rent due after the writ was served. In an action for possession, the tenant contended that the tender and acceptance of rent constituted waiver of the right to re-enter. This contention was rejected by Colssey J., who said:

"When once a landlord unequivocally and finally elects to treat a lease as void, as for instance, where he serves a writ of recovery of the land, no subsequent receipt of rent or other act will amount to waiver so as to deprive him of his right of re-entry"²

1. Extent of waiver

By section 32 of the Conveyancing Decree, 1973³, waiver of a covenant or condition:

" . . . shall be deemed to extend only to a breach of the covenant or condition to which such waiver specifically relates and shall not operate as a general waiver of the benefit of any such covenant or condition, unless a contrary intention appears"

Many covenants are liable to be broken by a single act, (e.g., a covenant against assignment), which once waived, cannot again ever entitle a landlord to exercise his right of re-entry. Other breaches (e.g., of a covenant to repair) are of a continuing nature. In such cases a waiver will extend only to a prior breach.

1. (1950) D.C.(Land) 748-51, 253.

2. Nukpa v. Hunter (1950) D.C.(Land) 748-51, 253, at 257.

3. N.R.C.D.175.

Waiver operates only in respect of past breaches, i.e., breaches committed in the period prior to the act which constitutes waiver. Therefore, if the tenant continues in breach after a waiver has been given, a right of re-entry will rise anew in favour of the landlord in relation to what is, in effect, further breach of the same covenant. This is made clear by section 33 of the Conveyancing Decree, 1973, which provides that notwithstanding any licence:

" . . . all rights under covenants and powers in force
are available as against any subsequent breach of
covenant, condition or other matter not specifically
authorised or waived, in the same manner as if no licence
had been granted"¹.

d. Statutory restriction on re-entry and forfeiture

The tenant is given protection against the loss of his tenancy by forfeiture. First, he is given every opportunity to remedy the breach that has given rise to the landlord's right to re-enter². Second, if he fails to remedy a breach within a reasonable time of being warned by the landlord to do so and the landlord brings an action for forfeiture against him, the tenant is entitled to apply for relief³.

By section 29(1) of the Conveyancing Decree, 1973⁴:

"29 (I) A right of re-entry or forfeiture under any provision in a lease for breach of any covenant, condition or agreement in the lease shall not be enforceable, by action or otherwise, until —

(a) the lessor serves on the lessee a notice:

(I) specifying the particular breach complained of;

1. Conveyancing Decree, 1973 (N.R.C.D.175), S.33(2)(a).

2. Conveyancing Decree, 1973 (N.R.C.D.175), S.29.

3. *ibid.*, S.30.

4. (N.R.C.D.175).

- (II) If the breach is capable of remedy, requiring the lessee to remedy the breach; and
- (III) (except where the breach consists of a non-payment of rent) requiring the lessee to make reasonable compensation in money for breach; and
- (b) the lessee has knowledge of the fact that such notice has been served;
and the lessee fails within a reasonable time thereafter, to remedy, and (except where the breach consists of non-payment of rent) to make reasonable compensation in money, to the satisfaction of the lessor, for the breach".

1. Service of notice

Unless otherwise provided for in a tenancy agreement, section 39 of the Conveyancing Decree, 1973, stipulates that the notice must be in writing. The notice shall be sufficiently served on the tenant if left addressed to him on the premises, or sent to him by registered mail, or left at his last known address in Ghana¹. Where the notice has been sent by registered mail to the last known postal address of the tenant, he shall be deemed—unless the contrary is proved—to have knowledge of the fact that the notice has been served as from the time at which the letter would have been delivered in the normal course of post².

2. Terms of notice

Reasonable details of the breach must be given, so that the tenant may know with reasonable certainty what is required of him. In the interpretation of section 146 of the English Law of Property Act, 1925—the putative father of section 29 of the Conveyancing Decree—the English courts have held that a notice is not invalidated merely because it includes more than the landlord is entitled to provide.³

1. Conveyancing Decree, 1973 (N.R.C.D.175), S.39.

2. *ibid.*, S.29(2).

3. Blewett v. Blewett [1936] 2 All E.R.188; Silverster v. Ostrowska [1959] 1 W.L.R.1060.

3. Time for Compliance

Again, there are no Ghanaian decisions on the issue, but in the construction of section 146 of the English Law of Property Act, 1952, the English courts have held that three months is usually a reasonable period within which the tenant must comply with the notice¹.

e. The Right of the Tenant to claim Relief

The pre-1973 position

I. Breach of the covenant to pay rent

One of the aims of the old Court of Chancery was to prevent the enforcement of a legal right from producing hardship. Therefore, since the sole object of a right of re-entry was to give a landlord security for the rent, equity was always prepared to relieve the tenant against forfeiture provided he paid all that was due by way of arrears of rent together with costs and interest². In Mills-Lamprey v. Yeboah³, the landlord granted a tenancy of a house to a tenant, except for one room and a porch which was already let to 'C'. The lease provided, inter alia, for a covenant for re-entry on failure by the tenant to pay rent. When later the tenant refused to pay rent, the landlord commenced proceedings for recovery of possession. While the case was pending, but before hearing began, the tenant made payment into court for five months arrears of rent. In granting relief against forfeiture, Abban J., stated the law thus:

1. See Penton v. Barnett [1898] 1 Q.B.276. It is submitted that the question of what constitutes 'reasonable time' depends on the circumstances of each particular case.

2. See Moubrak v. Eguakun (1956) 1 W.A.L.R.88; Ocansey v. Teiko [1973] 1 G.L.R.203

3. [1971] 1 G.L.R.18.

"The authorities clearly establish that the court may grant relief against forfeiture for re-entry on non-payment of rent provided that the rent was in arrears for six months and was paid before the trial and provided that the lessor could be put in the same position as before"¹.

The six-month limit was however not a strict time-scale. As with all equitable jurisdictions, the primary concern of the court was with the justice and merits of each individual case. As was said in one English case:

" . . . the court will not boggle at a matter of days"²

It was immaterial that the landlord had actually re-entered and re-taken possession of the premises. In Ribeiro v. Chahin³, the landlord re-entered the premises after the tenants had breached a condition to pay rent. In an action by the tenants, the West African Court of Appeal granted relief from forfeiture. Abbot J., considered the question whether relief can be granted after the landlord had actually re-entered and re-taken possession, and answered thus:

"I am clearly of the opinion that it can"⁴

II. Other covenants or conditions

Where the tenant is in breach of a condition or a covenant fortified by a forfeiture clause and the landlord brings an action to enforce forfeiture, the tenant may still apply for relief. The courts have the right to grant

1. *supra*, at p.23.

2. Thatcher v. Pearce & Sons [1968] 1 W.L.R.748, 756, per Simon P. (relief granted on application made six months and four days later).

3. (1954) 14 W.A.C.A.476.

4. *supra*, at p.478.

relief from forfeiture, having regard to the circumstances of each particular case. In Schandorf v. Zeini¹, Amissah J.A., relied on English cases and section 146(2) of the Law of Property Act, 1925 as giving the Ghanaian courts the power to grant relief from forfeiture in appropriate circumstances².

2. Post-1973 law

Since 1st January, 1974, the power to grant relief from forfeiture is statutorily conferred by the Conveyancing Decree, 1973.

Section 30 provides:

- "(1) Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any provision in a lease, or for non-payment of rent, the lessee of the property and also a sub-lessee of the property comprised in the lease or any part thereof may, either in the lessor's action (if any) or in any action brought by such person for that purpose, apply to the court for relief.
- (2) Subject to subsection (1) of section 29, where a lessee applies to the court for relief, the court may grant or refuse relief as it thinks fit having regard to the proceedings and conduct of the parties and to all the other circumstances; and the relief when granted may be upon such terms, if any as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any similar breach in the future, as the court in the circumstances of each case thinks fit".

1. [1976] 2 G.L.R.418.

2. *supra*, at p.437.

It is important to note that section 30 treats a right of re-entry arising from non-payment of rent and one arising out of breach of other conditions or covenants in the same way. The six-months rule¹ is therefore no longer applicable when relief is sought from forfeiture due to non-payment of rent. It is all a question of discretion for the court—taking into account all the facts of each case.

I. Limitation of time

Section 30 (1) opens with the words:

"Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture"

There is no Ghanaian decision interpreting this phrase; but in the interpretation of similar words in section 146(2) of the English Law of Property Act, 1925²—which section 30(1) reproduces verbatim—the English courts have held that the landlord cannot be said to be "proceeding" where he has secured judgment and has obtained possession of the premises by way of execution³. In other words, relief may be granted at any time before the landlord has actually entered possession. If the Ghanaian courts follow this interpretation - as, indeed, they are most likely to do⁴—this would mean that Ribeiro v. Chahin⁵ is no longer good law.

II. Denial of title

No relief is available against forfeiture for denial of the landlord's title. The rule is that a tenant who denies his landlord's title is automatically made liable to forfeit his tenancy—a rule derived from the fental

1. *supra*, p.301.

2. This section was by section III(2) of the Courts Act, 1971 (Act 372) made applicable to Ghana, until repealed by the Conveyancing Decree, 1973 (N.R.C.D.175).

3. Wilson v. Rosenthal (1906) 22 T.L.R.233; Charrington v. Camp [1902] 1 Ch.386.

4. The Ghanaian courts have a tendency of following—some would say slavishly—English decisions.

5. (1954) 14 W.A.C.A.476; *See supra*, p.301.

principle that repudiation of the lord destroys the tenure¹. This outmoded doctrine was applied in Safo v. Badu². In this case, the landlord applied for a possession order against a tenant who refused to attorn tenant to the landlord who had inherited the premises. It was held by the High Court that at common law a tenant who denied the title of his landlord was automatically made to forfeit his tenancy;

"And no relief is available against forfeiture at common law for denial of the landlord's title"³.

In England it has been held that section 146 of the Law of Property Act, 1925—which is the statutory basis upon which relief from forfeiture is granted—is inapplicable where denial of title is the ground for forfeiture because the section applies only to forfeiture "under any proviso or stipulation in a lease"⁴. In Safo v. Badu⁵, relief from forfeiture was not claimed under section 30 of the Conveyancing Decree, 1973, although the denial of title took place on 18th September, 1974⁶, and the learned judge did not consider the issue. It may be that both counsel for the tenant and the learned judge impliedly accepted the English decisions, and agreed that forfeiture for denial of title is not affected by section 30⁷. But it would have been that much better if the issue had been argued and ruled upon by the court; for it is at least arguable that the right of forfeiture for denial of title is a provision—albeit implied—of every residential tenancy agreement.

1. Doe d. Ellerbrock v. Flynn (1834) 1 C.M. & R.137; Wisbech st.Mary Parish Council v. Lilley [1956] 1 W.L.R.121.

2. [1977] 2 G.L.R.63.

3. [1977] 2 G.L.R.63, 66, per. Korsah J.

4. Warner v. Sampson [1958] 1 Q.B.404; reversed on other grounds 1959 1 Q.B.297.

5. op.cit.

6. The Conveyancing Decree came into force on 1st January, 1974.

7. It is not clear from the case whether the landlord complied with the notice requirement of section 29. It is arguable that not to deny the landlord's (cont.)

f. Relief to sub-tenants

Under normal common-law rules, privity neither of contract nor of estate exists between the landlord and a sub-tenant, and therefore termination of the head-tenancy automatically determined the sub-tenancy¹; for "every subordinate interest must perish with the superior interest on which it is dependent"². But by section 30(1) of the Conveyancing Decree, 1973, a sub-tenant of the whole premises or any part thereof can apply for relief when the head-landlord proceeds by action or otherwise to enforce a right of re-entry or forfeiture. A sub-tenant granted relief may be granted a new tenancy of the whole of the premises or any part thereof upon such terms as the court may think fit; provided that the duration of the new tenancy may not be longer than that of the original sub-tenancy³.

It is important to emphasise that the granting of relief from forfeiture is a purely discretionary matter for the court.

g. Conclusion

The determination of a tenancy — by any of the above means — does not entitle the landlord to evict the tenant⁴. In addition, the landlord must satisfy one of the conditions specified in section 17(1) of the Rent Act, 1963⁵. Tenants whose tenancy have determined, but who cannot be ejected because the landlord has not satisfied section 17(1) may continue in possession as statutory tenants⁶. The tenant may, of course, decide to quit on

title is a condition of a tenancy and that forfeiture for denial of title is governed by section 29.

1. See Great Western Railway v. Smith (1876) 2 Ch.D.235.

2. Bendall v. McWhirter [1952] 2 Q.B.466, 487, per Romer L.J.

3. Conveyancing Decree, 1973 (N.R.C.D.175), S.30(3); *See also Act 220, S17(6)*

4. *infra*, pp.307-312.

5. *infra*, pp.307-312.

6. Rent Act, 1963 (Act 220), SS.36, 28-29.

the determination of his tenancy; but if he decides not to, he cannot be lawfully¹ evicted unless the landlord satisfies section 17(1).

B. THE EVICTION OF TENANTS

It need hardly be pointed out that whatever rights are conferred upon tenants and whatever obligations are imposed on landlords—such as, implying a warranty of habitability or restricting the level of rent—would not be worth the paper they are written on if landlords are to retain their common law right of eviction on the termination of a tenancy². Thus any attempt at constructing a more equitable regime of laws to regulate the residential tenancy relationship must be underpinned by rules affording the tenant security of tenure and restricting the landlord's right to eject tenants. Such restriction must, however, not be made absolute. A landlord must be able to regain possession if he has reasonable cause for so wanting. The security of tenure provisions of section 17 of the Rent Act, 1963 (Act 220) seeks to maintain a balance between absolute freedom and prohibition.

Security of tenure is important because, unlike sale which has to be regulated and/or controlled at the time the contract is being entered into because it is a once-for-all transaction³, the residential tenancy relationship can be regulated and/or controlled after the contract is entered into and the tenant is in possession. By making it very difficult to evict a tenant, thereby providing him with enough leverage, the tenant is able to resist attempts to make him pay a rent higher than that fixed by law, and is more capable of insisting on any rights he may have.

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1. However, the landlord may effectively eject the tenant - even if such eviction is illegal and in contravention of the Rent Act, 1963. See *infra*, pp.332-333.
 2. This is particularly so in Ghana where monthly tenancies, which under the common law can be terminated after a month's notice, predominate.
 3. E.g., price control and implied terms like a warranty of merchantability.

Under section 17 of the Rent Act, 1963 (Act 220) no eviction order shall be made by the appropriate Rent Magistrate, or by any judge of competent jurisdiction except in the circumstances specified in the section¹.

I. Reasonableness of the order

The courts have held that the granting of an eviction order against the tenant is not automatic on the satisfaction of section 17(1). It is discretionary. Section 17(1) does not place an affirmative duty on judges to make an eviction order in any set of circumstances. Rather it enjoins a judge not to make order unless its rules are satisfied. The satisfaction of any of the conditions specified in section 17(1) is therefore a necessary condition for the grant of an eviction order; not a sufficient condition. Section 17(1) is enabling not mandatory. The law was thus stated by Ollennu J., (as he then was) in Bassil

v. Said Road:

"In my opinion section 11(1) is not to be interpreted as mandatory upon a court to make an order for recovery of possession whenever anyone of the grounds therein set is proved to exist. The proper interpretation of that section should be that the court may grant an order of possession or ejectment of a tenant whenever any of the grounds stated in the section is proved, but only in the circumstances in which it would at common law be obliged to make such an order"².

II. Determination of Tenancies

As the above quotation shows, the courts have consistently held that an eviction order will not be made unless the landlord is, at common law, entitled to determine the tenancy. In other words, in addition to satisfying

1. S.17(1); infra pp. 312-331.

2. Bassil v. Said Road, (1957) 2 W.A.L.R.231. The case was decided on the basis of similar provisions in the Rent Control Ordinance, 1952.

section 17(1) a landlord seeking to evict a tenant must also establish that he has a common-law right to determine the tenancy — or, indeed, that he has already done so¹. In Ramia v. Mouissie², the tenant held premises from the landlord by a verbal agreement. The terms of the agreement were not in evidence except that it was clear that rent was payable monthly. When the tenant defaulted in paying rent, the landlord sued for arrears of rent and recovery of possession. The trial court gave judgment for the landlord for arrears of rent but refused an eviction order. The landlord appealed to the High Court, where it was argued on his behalf that the law³ provided for eviction if rent was in arrear. This contention was rejected by Smith J., who held that the regulations were aimed at restricting not enlarging the powers of the landlord. The landlord must establish firstly that he could recover possession apart from the regulations, and secondly that the regulations did not prevent him from exercising rights he would otherwise have had. The landlord was required to give a month's notice to the tenant of his intention to recover possession⁴. Not having done so he had no right at common law to recover possession.

The effect of the security of tenure provisions is, in the words of Windsor - Aubrey J.,:

"to afford greater not less protection to the tenant than existed under common law"⁵

The above statement was quoted with approval by Ollennu J., (as he then was) in Bassil v. Said Rqad⁶. In this case, there was a reduction of rent during

1. See Bassil v. Said Rqad, supra; Allamedine Bros. v. P.Z. [1971] 2 G.L.R.403.

2. (1945) D.C.(Land) 3847, 177. The case was decided on the basis of similar provisions in the Rent Restriction Regulations, 1943.

3. The Rent Restriction Regulations, 1943.

4. The tenancy was held to be a monthly tenancy.

5. Moubarak v. Eguakun (1956) 1 W.A.L.R.88,. The case was decided on the basis of similar provisions in the Rent Control Ordinance, 1952.

6. supra.

the currency of a tenancy. The landlord claimed that it was a temporary concession, but the tenant contended that it was a permanent reduction. The landlord sued for recovery of possession on the grounds of non-payment of rent and breach of a covenant not to sub-let without the consent of the landlord. The court refused to grant an eviction order, holding that there was no arrears of rent—the landlord being estopped from claiming any arrears of rent on the principle of promisory estoppel enunciated by Denning J., as he then was, in the High Trees case¹. As regards the covenant against sub-letting, the court held that since the covenant was not backed by a forfeiture clause there was no right of re-entry consequent on its breach. The landlord therefore had no right to terminate the tenancy and could not take advantage of the provisions of the Ordinance².

In more recent cases—decided on the basis of section 17(1)—the courts have maintained the position that a landlord would only be granted an eviction order if he has a common-law right to terminate the tenancy or, indeed the tenancy has determined, and also satisfies one of the conditions specified in section 17(1)³. In Bassil v. Sfarijlani⁴, a landlord was refused an eviction order even though the tenancy has determined through the effluxion of time. The court pointed out that expiration of the tenancy is not one of the conditions specified in section 17(1); for the landlord to succeed he must satisfy one of the conditions specified in section 17(1) in addition to the expiration of the tenancy. Again, in Karam & Sons v. Traboulsi⁵, the landlord was refused an eviction order after the tenancy had expired. The court held that the tenant who had stayed on had become

1. [1947] K.B.130.

2. Rent Control Ordinance, (No.2), 1952, S.11(1).

3. See Allamedine Bros. v. P.Z. [1971] 2 G.L.R.403.

4. High Court, Accra, 1 October 1966; digested (1967) C.C.20.

5. [1964] G.L.R.513.

5. [1964] G.L.R.513.

a statutory tenant and could not be evicted except in accordance with the provisions of the Rent Act, 1963¹.

The above interpretation of section 17(1) has been seriously challenged by Kludze.² The main weapon in Kludze's armoury is the word "tenant" in the opening words of section 17(1). This provides that:

".... no order against a tenant for the recovery of the possession of, or for the ejectment from, any premises shall be made or given..."

Kludze argues forcefully that only tenants are protected by section 17(1). And that since a person whose tenancy has expired or otherwise determined is only a former tenant such a person is not protected by section 17(1).

It is submitted that Kludze's view is not correct.³ Analysis of judicial interpretation of the precursors of section 17(1) shows that the orthodox interpretation has consistently been followed.⁴ This is important. As Woodman points out, by re-enacting these provisions the legislature may be deemed to be endorsing these judicial decisions.⁵ This view is supported by the fact

1. Act 220, s.17(1).

2. Kludze, A.K.P., "The termination of leases", (1975) 7 R.G.L. 10, p.27 et. seq.; "The equitable tenant and protection against eviction", (1976) 8 R.G.L. 63, 66-68.

3. For a robust defence of the orthodox interpretation, see Woodman, G.R., "In defence of section 17 of the Rent Act", (1975) 7 R.G.L. 144.

4. See Ramia v. Mouissie (1945) D.C. (Land) '38-'47 177; Moubarak v. Eguakun (1956) 1 W.A.L.R. 88; Bassil v. Said Raad (1957) 2 W.A.L.R. 231.

5. *ibid.*, p.148.

in two instances new provisions were enacted in order to reverse judicial interpretation of the previous enactment.¹

Secondly, Kludze's view, would render the whole of section I7(I) redundant.² A tenant does not need the protection of section I7(I) he simply cannot be evicted. But, surely, section I7(I) is aimed at protecting some people. It is submitted that it is aimed at providing security to those whose tenancies have, by the normal operation of the common-law rules, determined. It is these people whose leases have expired, but who by virtue of section I7(I) cannot be evicted, that Act 220 refers to as "statutory tenants".³

1. s.16(2)-(5) reversing the effect of Hinnawi v. Bassil (1958) 3 W.A.L.R. 495; and s.I7(I)(g) reversing the effect of Azar v. Saad (1957) 2 W.A.L.R. 242.

2. See Woodman, G.R., "In defence of section I7 of the Rent Act", op. cit., at pp. 149-150.

3. SS.28 and 29. It may be noted that Kludze's view, as Woodman points out has the effect of rendering these provisions frustrate because by his interpretation there can be no statutory tenants.

But, perhaps crucially, Kludze's view, if accepted, would make rent control and the structuring of a more equitable regime of laws to govern the residential tenancy relationship impossible. This would be particularly so with monthly tenancies which predominate in Ghana¹. A landlord confronted with a vigilant tenant who is insistent upon his rights, and would not pay more than the legal rent would give the tenant a month's notice after which the tenancy determines. And the tenant, being then only a former tenant, will have no protection. Prudence will thus compel tenants to be docile since insistence on his rights would result in his being homeless after two months. Thus the whole policy of the Rent Act, 1963—the restriction on the level of rents—is defeated on Kludze's interpretation. It is, therefore, submitted that the orthodox view is more in line with the letter and spirit of section 17(1) and of Act 220 generally.

III. Scope of section 17(1)

Act 220 must be applicable². In addition the tenant must pay rent. Gratuitous tenancies are, therefore, outside the scope of section 17(1). In Safo v. Badu³, the landlord applied for recovery of possession because the tenant had refused to attorn tenant to him. The tenant was a tenant at will and paid no rent. Counsel for the tenant argued that an eviction order could not be made because the landlord did not satisfy any of the conditions specified in section 17(1). This contention was rejected by Korsah J., who said:

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1. Judicial notice was taken of this fact by Sowah, J.A., delivering the unanimous decision of the Court of Appeal, in Allamedine Bros. v. P.Z. [1971] 2 G.L.R.403.
 2. See *supra*, pp.237-240.
 3. [1977] 2 G.L.R.63.

"The Rent Act, 1963 (Act 220), sought to regulate the relationship of landlord and tenant only where the consideration of rent is a feature of the lease or tenancy, but left untouched tenancies existing under the common law where landlords did not exact rent as consideration for the letting of premises. Thus, the rights of the landlord and tenant at common law, in cases where the consideration of rent is not a feature of the letting of premises, are unaffected by Act 220.

It is significant that Act 220 is entitled the Rent Act and not the Landlord and Tenant Act; for we have only a statute regulating tenancies on which the incidence of rent is a feature and not one regulating the relationship of landlord and tenant in general"¹

IV. Specific grounds for recovery of possession

Under section 17(1):

" . . . no order against a tenant for the recovery of the possession of, or for the ejectment from, any premises shall be made . . . except in any of the following circumstances:

a. Arrears of rent

"(a) where any rent lawfully due from the tenant has not been paid or tendered within one month after the date on which it became lawfully due";

The rent in arrear must be lawfully due. Therefore arrears of rent arising from non-payment of part of contractual rent in excess of the recoverable rent — as defined by Act 220 and subsequent legislation — can not be the basis for eviction.²

1. *Op.cit.*, at p.67.

2. See Kludze, A.K.P., "The termination of leases" *op.cit.*, 16.

The rent must be in arrear. It has been noted that there are certain circumstances in which the tenant is legally justified in making deductions from future rent¹. Where such deduction is permissible the landlord has no cause of action—there is simply no arrears of rent².

In interpreting this paragraph, some judges have held that at least two months' rent must have fallen into arrear. In Dennis v. Agbetetei³, Francois J., as he then was, said:

"A claim for forfeiture will only lie if rent for at least two months remains unpaid"⁴

The same view was taken in Asante v. Brown⁵. In this case, it was held that an eviction order may only be made:

" . . . where the rent has not been paid or tendered within one month after the date on which it became due, which means that at least two month's rent have fallen into arrears"⁶.

It is submitted that this view, though a practical formulation of the position as regards monthly tenancies in which rent is payable in arrear, is not accurate as a formulation of general principle.⁷ It is patently misleading in the case of fixed tenancies and other periodic tenancies in which rent is not payable monthly.

1. *supra*, pp. 222-224.

2. See Rank, P.M., "Repairs in lieu of rent", (1976) 40 Conveyancer 196, 202-206.

3. High Court, Ho, 31 October 1969; digested (1970) C.C.21.

4. *ibid*.

5. (1969) C.C.94.

6. *ibid*, per the Court of Appeal (Ollennu, Apaloo and Lassey J.J.A.)

7. See Kludze, A.K.P., "The termination of leases", *op.cit.*, p.16.

It has also been persuasively argued by Kludze that the amount of rent in arrear need not be the full rent¹. It is sufficient if it is part of the rent lawfully due and it has not been paid or tendered after one month from the date on which it became lawfully due. This view is better than the view of Francois J., that at least two months' rent must be due. In Dennis v. Agbeteku, Francois J., took the view that:

"It is not the intention of the legislature that a landlord should add up bits of rent not fully satisfied and when an amount equivalent to at least two months' rent has been reached to ask for ejectment"².

This interpretation is of doubtful validity. As has been argued, section 17(1)(a) does not say that two months' rent must be in arrears before eviction can be granted. It says that ejectment may be granted where:

"any rent lawfully due . . . has not been paid or tendered within one month after the date on which it became lawfully due"³.

This, it is submitted, includes parts of any monthly, quarterly or yearly rent not paid after a month from when it became lawfully due.

b. Breach of Covenant

"(b) where any obligation of the tenancy, other than that specified in paragraph (a), so far as such obligation is consistent with the provisions of this Act, has been broken or not performed".

It is clear from the paragraph that breach of a term which is inconsistent with the provisions of Act 220 cannot be the basis for an eviction order.

1. Kludze, A.K.P., "The termination of leases", (1975) 7 R.G.L.10, 16-18.

2. (1970) C.C.21.

3. Rent Act, 1963 (Act 220), S.17(1)(a), (emphasis supplied).

Therefore a monthly tenant who, for example, has undertaken to pay six months' rent in advance as a condition for the grant cannot be evicted if he defaults; for the obligation though contractual is inconsistent with the provisions of Act 220¹.

c. Nuisance or annoyance

"(c) where the tenant or any person residing with him has been guilty of conduct which is a nuisance or annoyance to adjoining occupiers;"

Neither "nuisance" nor "annoyance" is defined by Act 220. This is lamented by some judges². Nuisance has been defined by Kludze as:

" . . . an act or omission which constitutes or results in an interference with, disturbance of, or annoyance to, another person in the use, exercise or enjoyment of a right, title, ownership or occupation of land, premises, easement or other right connected with land . . ."³.

What constitutes a nuisance or annoyance to others will always remain a question of fact. In Ofori v. Arthur⁴ the caretaker of 'B' let a room to 'A' who in turn sub-let to 'C'. 'C' immediately upon assuming possession wrote letters to the Tema Development Corporation — the lessor — alleging that the principal tenant was disreputable and urging the corporation to grant the original tenancy to him. This application was turned down and the caretaker gave 'C' notice to quit. When 'C' refused to vacate the room, the caretaker applied for an eviction order on the grounds that 'C' was a nuisance. In granting the order, Kingsley-Nyinah J., had this to say:

1. S.25(5).

2. Ofori v. Arthur (1970) C.C.112, per Kingsley-Nyinah, J.

3. "The termination of leases", (1975) 7 R.G.L.10, 19.

4. *supra*.

"It is not at all surprising, then, that neither the Rent Regulations, 1964 (L.I.369), nor its parent statute, the Rent Act, 1963 (Act 220) ventures a definition of the word 'nuisance' or the word 'annoyance'. This omission I think entitles one to interpret the word not abstractly, but beneficially, having regard to the peculiar facts and circumstances of each particular case. I do earnestly hope that when this Act 220 comes to be revised, or amended, the draftsman would give us reasonable and practicable definition of these important words 'nuisance' and 'annoyance'"¹.

The difficulties envisaged by Kingsley-Nyinah J., have already claimed a victim. In Dennis v. Agbetetei², it was held that the pounding of fufu on the top floor of a single storey house amounted to a nuisance². This decision is questionable in as far as it seeks to curtail the preparation and enjoyment of a staple Ghanaian dish³. It is not clear from the digest whether there was any facility on the ground floor for the pounding of fufu and the tenant had failed to avail himself of this facility. If no such facility existed then this decision would seem to be prohibiting the eating of a staple Ghanaian dish. This would run counter to a deep-seated Ghanaian mode of life. Such socially-transforming law is likely to be ignored.

Although it may appear a digression, it is worthwhile briefly looking at other experiences in other countries with socially - transforming laws. The experience of Prohibition in the United States is an important starting-point. But, perhaps more importantly, the decision in Dennis v. Agbetetei is an example of laws passed, judicial decisions delivered, common - and civil-law rules imported into Africa and Third-World countries without a consideration of the socio-economic milieu within which they are to operate—an important consideration in the successful engineering of social reform. A couple of illustrations seem appropriate.

1. Ofori v. Arthur (1970) C.C.112.

2. (1970) C.C.21.

3. See Kludze, A.K.P., "Termination of leases", (1975) 7 R.G.L.10, at p.20.

In 1964, the Ivory Coast enacted a series of measures designed to promote the breakdown of the extended family, promote monogamy and foster the cohesive nuclear family. Polygamous second and subsequent marriages were declared null and void and receipt of the marriage consideration was made illegal. All these were done in the face of entrenched traditional patterns in the population which varied from the legislation on every point. Field research has shown that this attempt at law-leading social change has proved a dismal failure¹.

In Ethiopia, after World War II, it was considered that there was need for a modern set of codes to replace in a large measure customary and religious practices from diverse sources. The new codes, enacted between 1957 and 1965 incorporated very little of practice; indeed the aim was to transform. The draftsman, Professor R.David, and the Codification Commission drew on what they considered to be the best of European common - and civil law systems and added a few innovations of their own. Though the Codes were programmatic in the extreme, research shows that they have had little or no effect on Ethiopian social and economic life².

Another example is the Soviet modernizing experiment in Soviet Central Asia from around 1926 to early 1929. The Soviet Union enacted new codes for female emancipation in a traditional muslim society. This involved rules permitting women to appear in public without the veil, encouragement of divorce, etc. These changes met with such severe hostility and opposition from men, but also from women, that the whole scheme had to be abandoned³.

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1. See Mundt, R.J., "The internalization of law in a developing country, the Ivory Coast Civil Code", (1978) 16 African L.Std. 176; Levasseur, A.A.; "The modernization of law in Africa with particular reference to family law in the Ivory Coast", (in) Foster, P and Zolberg, A.R., (eds.) Ghana and the Ivory Coast, Chicago, 1971
 2. See Vanderlinden, J., Introduction au Droit de L'Ethiopie moderne, Paris, 1971, esp. pp. 212ff ; Beckstrom, J., "Handicaps to legal social engineering in a developing nation", (1974) 22 Am.J. of Comp. Law 697.
 3. Massell, G., "Law as an instrument of revolutionary change in a traditional milieu: the case of Soviet Central Asia", (1968) 11 Law and Society Review 179.

The essential message of all these failures is that lawmakers (the myth that judges do not make law has long since been exploded by the American Realists) should be supremely conscious of the sociology and, in the particular case of Dennis v. Agbetetei, the eating - habits of the people; for "artificial rules", says Malinowski, writing about laws which do not take account of sociological, psychological and physiological factors, "either do not work or work at such a cost to the most fundamental institution . . . that all the substance of the social life and culture is destroyed"¹.

From applied juristics to the more mundane business of Act 220. It is important to note that a landlord in occupation is an adjoining occupier in the same right as any other occupier of premises². Therefore a landlord in occupation of part of the premises or adjoining premises is within the terms of the paragraph if he establishes nuisance or annoyance by the tenant.

d. Immoral or illegal user

"(d) where the tenant or any person residing with him has been convicted of using the premises or allowing the premises to be used for immoral or illegal purposes;"

It is important to note that if the landlord's application is based on this paragraph an actual conviction must be proved³. Anything short of a conviction —an allegation, custody pending trial or a confession—would not suffice.

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1. Introduction (to) Hogbin, Law and Order in Polynesia, London, 1934, p.XXI
 2. Dennis v. Agbetetei (1970) C.C.21
 3. See Frederick Platts & Co.Ltd. v. Grigor [1950] 1 T.L.R. 859.

It is difficult to envisage what sort of crime qualifies as immorality under this paragraph. Indeed, the immorality aspect of the paragraph seems superfluous. Conviction necessarily means that an act or omission is criminal —illegal. But what is an immoral crime? Conviction for using premises for gambling or as a brothel means that such conduct is illegal. But is it necessarily immoral? It is submitted that the purpose of the paragraph would be served without unnecessary excursions into ethical questions.

e. Waste, neglect or default

"(e) where the condition of the premises has in the opinion of the Magistrate or Judge deteriorated owing to acts of waste by, or the neglect or default of, the tenant or any person residing with him;"

A landlord seeking eviction on the ground of waste, neglect or default of the tenant must prove that the premises have deteriorated as a result of the act or omission of the tenant. An ameliorating waste or any structural alteration which has not diminished the value of the property cannot be the basis of an eviction order¹.

f. Notice to quit

"(f) where the tenant has given notice of his intention to quit in writing and in consequence of such notice the landlord has contracted to sell or let the premises or had taken any other steps as a result of which he would, in the opinion of such Magistrate or Judge, be seriously prejudiced if he could not obtain possession;"

This provision is in accordance with good sense and the principle of promissory estoppel the foundations of which were laid by Denning J., as he then was, in the High Trees case². To succeed under this paragraph, the landlord

1. For the different kinds of waste, see *supra*, pp.192-193

2. [1947] K.B.130. For the subsequent development of the principle see Lord Denning, The Discipline of Law, London, 1979, pp.197-223.

must have acted in consequence of the tenant's notice. It is not good enough if the landlord acts before the tenant's notice or, indeed, if at the time of acting the landlord had no knowledge of the tenant's notice.

The notice must be in writing, and must be valid in law to determine the tenancy¹.

g. Required by landlord for occupation

Under paragraph (g) an eviction order may be made where the premises are reasonably required for personal occupation as a dwelling house by the landlord himself, a member of his family or any person in the full time employment of the landlord.

It is important to note that for the purpose of this paragraph the word "family" should not be understood in its customary law signification of extended relations². The interpretation section of Act 220 defines "member of the family" as:

"... the father or mother, a wife, husband, child, brother or sister"³.

Other relations are therefore excluded. In Owusu v. Asante⁴, a tenant was ordered by a district court to vacate premises because it was reasonably required for the use of the landlord's nephew. On appeal to the High Court, the order was quashed because a nephew is not a member of the landlord's family as defined by section 36 of Act 220. The law was thus stated by Mensa-Boison J:

1. See *supra*, pp. 284-289.

2. For the concept of the family in customary law, see A.N. Allott, "Legal personality in African law", in M. Gluckman (ed); Ideas and Procedures in African customary law, London, 1969, p.179, at 182-189; Kludze, A.K.P.; Ewe Law of Property, London, 1973, pp.30-79; Woodman, G.R., "The family as a corporation in Ghanaian and Nigerian Law", (1974) 11 Af. Law Studies, p.1.

3. S. 36.

4. [1974] 2 G.L.R. 220.

"Section 36 as it now stands does not include a nephew in the category of members of the landlord's family. That, in the matrilineal pattern of Ghanaian society may sound odd to deny the nephew, who may possibly inherit the whole estate on the death of the landlord, the status of his being a member of the landlord's family in the sense of being a dependent, while the landlord was alive. Whether that was the *real* intention of the legislature or the draftsman's oversight that is the present state of the law and the court must give effect to it"¹.

It must be pointed out that the definition is not an oversight by the draftsman. The issue was considered by the Kwaku Bousu Committee — on whose recommendations Act 220 was enacted. The *Committee recommended*:

"We agree that it is desirable that the number of persons for whom a landlord may recover possession should be limited, and therefore recommend that family be defined in the new Act as including father, mother, wife/husband, children, brothers and sisters"².

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1. [1973] 2 G.L.R. 220, 221. The learned judge's assertion that the pattern of Ghanaian society is matrilineal is inaccurate. The Akan are matrilineal. But others, like the Ga, (see Field, M.J., *Social Organisation of the Ga People*, London, 1940), the Ewe (see Kludze, A.K.P., *Ewe Law of Property*, London, 1973) and the Gonja (see *Hatusa v. Haruna* [1963] 2 G.L.R. 212) are patrilineal. Nor is the implied assertion that intestate succession in Ghana is matrilineal accurate. Once again, intestate succession among the Akan is matrilineal. But others, like the Ga (see *Coleman v. Shang* [1959] G.L.R. 390, [1961] A.C. 481 — legal decisions which hold that the Ga Mashi follow a modified system of matrilineal succession see *Vanderpnyne v. Botchway* (1951) 13 Sel. Judg., Ct. of App., 164 are "a colossal pyramid of error": Allott, A.N., *A Note on the Ga Law of Succession*, 1953, Bull. S.O.A.S. 164), the Adangbe (see Pogucki, R., *Gold Coast Land Tenure*, Vol. II, Accra, 1955, p. 39), the Ewe (see Kludze, *supra*, pp. 256 at seq.), and the Gonja (see *Hatusa v. Haruna*, *supra*) practice a patrilineal system of intestate succession. Such sweeping generalizations are therefore inaccurate and there is no reason to lump all the people of Ghana together as having a matrilineal pattern, whatever that means. This process of 'lumping together' is justified by some in the name of uniformity and progress. In *Biei v. Akomea* (1956) 1 W.A.L.R. 174 the following statement was made: "This court cannot allow local customs to override general principles and practice in these days of changing conditions".

(Cont.)

It is obvious that mother or father, a wife, husband, child, brother or sister means son or daughter, etc., as determined by the law of Ghana¹. Therefore a landlord who being already married under the customary law purports to marry another woman under the Marriage Ordinance, 1948, cannot claim an eviction order on the grounds of requiring the premises for the second lady because such a purported marriage is null and void²; the woman is therefore not his wife.

The question whether a person is a son or daughter, father or mother of the landlord will be determined by the domiciliary law of the landlord. In Coleman v. Shang³ the Court of Appeal, in determining who a wife or child is for the purposes of the Statute of Distribution⁴, said:

"Under the Statute of Distribution a 'wife' means a 'lawful wife', and child means 'a lawful child'. The question of 'lawful wife' and 'legitimate child' are questions of status to be decided by the law of domicil. Therefore, if a marriage between a man and a woman is by the law of their domicil a valid marriage, the 'wife' is a lawful wife for the purposes of the statute no matter whether or not the marriage is invalid by the law of England or any

1.(cont.)

While minor points of local detail may be smoothed over in the name of uniformity and progress, it is submitted that this does not justify condemning millions of people to a social formation alien to them.

2. Report of the Committee of Enquiry into the Operation of the Rent Control Ordinance (No.2 of 1952), Chp.V., para.44.

1. See Coleman v. Shang [1959] G.L.R.390, [1961] A.C.481.

2. Cap.127 (1951 Rev.), S.14.

3. *supra*.

4. 1670 (22 & 23 Car.2, C.10).

other place. Similarly, if a child is legitimate by the law of the country whereat the date of its birth its parents were domiciled, he is a legitimate child for purposes of the statute, no matter whether the child would be illegitimate by English law".¹

Thus whatever the circumstances in which a child is born — father not married to mother, issue of a man married under the Marriage Ordinance, 1948 and another woman, etc. — it is a son or daughter, and has a father or mother, once paternity is acknowledged.²

There is no limitation on the age of children. In Nimako v. Archibold,³ the landlord claimed recovery of possession on the ground that he required the premises for occupation by himself and his family. The case went as far as to the Supreme Court, where it was argued on behalf of the tenant that the words "any member of his family" in the Rent Ordinance, 1952, section II(1) (d) did not include children who are of age or married. This contention was rejected by the Supreme Court. Siriboe J.S.C., delivering the unanimous opinion of the court, said:

" . . . the view of this court is that the Rent Control Ordinance or customary law does not place any limitation on the class or age of the landlord's family, for whose occupation the landlord should establish that he reasonably requires possession of his premises from the tenant".⁴

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1. Report of the Committee of Enquiry into the Operation of the Rent Control Ordinance (No.2 of 1952), p.29, Chp.V, para.45.
 2. See Coleman v. Shang, supra; Kludze, A.K.P., Ewe Law of Property, London, 1973. On the question of legitimacy in the Ghanaian law, which is different from paternity — legitimacy being a status of a child dependent on the relationship between his two parents, while paternity is the relationship of father and child — see Woodman, G., "Too many illegitimate children?", (1975) 12 U.G.L.J.51.
 3. [1966] G.L.R.612.
 4. *ibid.*, at p.616.

For an order to be made on this ground, it must be established that the premises were constructed to be used as a dwelling-house.* The test is not whether the premises are being used as a dwelling house, or can be so used, but whether they were constructed to be used as a dwelling house.

The Kwaku Bonsu Committee recommended that:

" . . . it is more reasonable to relate the words dwelling house to the nature of the premises or to the purpose for which they were intended rather than to the purpose to which the landlord intends to put them" ¹.

Where the landlord claims that he needs the premises to house an employee, he must prove to the satisfaction of the court that he usually provides accommodation to the class of employees to which the employee in question belongs ².

The court has a discretion in deciding whether to grant the order or not. The landlord must prove that the premises are "reasonably required" and that he is acting in good faith. In Owusu v. Aidoo, ³ the plaintiff left a store which he was occupying when he quarrelled with his landlord, who was his mistress. He then sought to move into his own store which he had let to the defendant. It was held that the plaintiff did not "reasonably require" the premises for his own use, in as much as he was under no obligation to quit the store he was occupying. The court said:

"The question whether premises are reasonably required by a landlord for his own use is a question of fact for the Court. In considering whether it is reasonable or not to make an order for possession the Court considers the interest of the landlord and of the tenant

Where, as in this case, a landlord elects upon his wife's good grace to occupy her store whilst letting out his own premises

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1. Report of the Committee of Enquiry into the operation of the Rent Control Ordinance (No.2) of 1952, p.29, chap.V, para.45.
 2. S.17(1)(g)(i).
 3. (1946) D.C.(Land) 1938-47, 241(decided on the basis of similar provisions in the Rent Restriction Regulations, 1943). The case involved a commercial letting; but, it is submitted that the same principle would apply to residential tenancies.

* S.17(1)(g)

at profit can he, on falling out with his wife and vacating her store in order to assuage her, claim that he reasonably requires his own premises for his own use?"¹

The landlord has to show that he genuinely needs the premises at the present time and not merely that he prefers it to, or that it is more convenient than, other premises available to him. In the Nigerian case of Breedy v. Khalife,² the court expressed the law thus:

"The words "reasonably required" connote something more than desire, although, at the same time, something less than a necessity will do"³.

It is a matter of fine judgment to be determined by the court. In Nimako v. Archibold,⁴ the landlord applied for an eviction order on the ground that he required it for occupation by himself and his children. The landlord had been living with four children in uncomfortable circumstances and had to travel a considerable distance to and from work. It was argued on behalf of the tenant that the landlord did not "reasonably require" the premises but wanted it because it was more comfortable and convenient. This contention was rejected by the Supreme Court which held that on the totality of the evidence the premises were reasonably required by the landlord.

The court must also weigh the equities. An order will not be made on this ground if the court is satisfied that having regard to all the circumstances of the case—including whether alternative accommodation is available to the landlord or tenant—greater hardship would be caused by making the order than by refusing it⁵. The burden of proving reasonable requirement of the premises is on the landlord, but that of establishing greater hardship is

1. op.cit., at p.241.

2. (1952) 20 N.L.R.91.

3. ibid., per de Comarmond S.P.J. at p.92.

4. [1966] G.L.R.612.

5. S.17(1)(g)(II).

on the tenant. In Bikhazi v. Secretary of State of U.S.A.¹ the landlord was granted possession of two of three houses previously let to the tenant. The landlord had seven other houses in Accra. The tenant (the government of the United States) had made no attempt at securing alternative accommodation.

The court held that the onus was on the tenant to show that greater hardship would be caused by granting the order than by refusing it and that the tenant had failed to discharge this onus.

The existence of alternative accommodation is a factor to be taken into account in determining the question of greater hardship. But the existence or otherwise of alternative accommodation for the landlord is not conclusive.² Failure by the tenant to attempt to secure alternative accommodation would weigh heavily against him.³ So would failure by the tenant to attempt to regain premises owned by him.⁴ The landlord is under no obligation to provide the tenant with alternative accommodation before recovering possession.⁵

h. Premises required by the landlord for his business

"(h) where the lease has expired and the premises are reasonably required by the landlord to be used by him for his own business purposes, such premises being constructed to be used as such, if the landlord has given not less than six months' written notice to the tenant of his intention to apply for an order for the recovery of the possession of, or ejection from, the premises".

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1. (1952) D.C.(Land) '52-55, 125 (decided on the basis of similar provisions in the Rent Control Ordinance, 1952).
 2. See Allamedine Bros v. P.Z. [1971] 2 G.L.R.403; Nimako v. Archibold [1966] G.L.R.612; Rawanji Bros. v. P.Z. [1975] 2 G.L.R.352.
 3. See Rawanji Bros. v. P.Z., supra, at 360 where such conduct was described as being "not only unreasonable but unconscionable".
 4. *ibid.*
 5. Nimako v. Archibold [1966] G.L.R.612, 617.

The landlord must prove that the premises were constructed for use for business purposes; the use to which the premises is being put is irrelevant. The provision can therefore be used to evict a residential tenant if the premises he is occupying was constructed for use for business purposes. Act 220 does not define what a business purpose is; presumably, it excludes use for residential purposes.

1. Premises required for remodelling, etc.

Under section 17(1)(i) a landlord may be granted an order of ejectment where the tenancy has expired and the tenant is a statutory tenant, if the landlord intends:

- (I) to pull down the premises and construct a new one; or,
- (II) to remodel the premises and the remodelling cannot be effected with the tenant in occupation; or,
- (III) to carry out a scheme of re-development, if the landlord has given not less than six months' written notice of his intention to apply for such an order.

Where the landlord requires premises for any of these reasons, he must first furnish the appropriate rent officer with a statutory declaration to this effect.¹

It seems reasonable that a tenant should not stand in the way of a landlord who wants to carry out repairs or alterations to premises.² However, to ensure that these may not be used as a pretext for evicting undesired tenants, Act 220 provides that the court, in making the eviction order, may specify a period within which the work is to be done.³ The court may also order that if the landlord fails to implement his intention within the stipulated time, the former tenant be reinstated as a statutory tenant at the rent previously payable or be paid such compensation as the court may consider reasonable.⁴

1. Rent Regulations, 1964 (L.I. 369), reg.18.

2. See Seraphim v. Pacific Stores [1974] 1 G.L.R.301, 304.

3. S.17(1)(i)(aa).

4. *ibid.*

It is not every type of remodelling which will enable the landlord to get an eviction order. It must be established that the remodelling cannot be done while the tenant is in possession.¹

What amounts to "remodelling" or a "scheme of re-development" is not defined by Act 220. It is submitted that this is a question of fact to be determined by the courts in particular cases. In Aschkar v. Somuah,² the proposed work to be carried out on the premises involved inter alia the removal of two interior walls dividing the tenant's premises from the rest of the building. The court held that this was an adequate ground for an eviction order. The West African Court of Appeal said:

" . . . the true test for determining whether a scheme of re-development put forward by the landlord is a scheme within the meaning of the Ordinance sufficient to merit the making of an order for ejectment is, can the scheme be carried out if the landlord does not recover possession of the premises".³

This test was used by the Court of Appeal in Seraphim v. Pacific Stores.⁴

The courts have therefore taken a pragmatic approach in their interpretation of 'remodelling' and a "scheme of re-development"; they have not been bothered with distinguishing between remodelling and a scheme of re-development. This may be expedient for the expeditious resolution of disputes, but it has its drawbacks. Where an order is made under (II) above —

1. S.17(1)(b)(ii).

2. (1957) 2 W.A.L.R.264.

3. *ibid.*, at p.268.

4. [1974] 1 G.L.R.301.

remodelling the tenant shall have the option to acquire the remodelled premises as a statutory tenant.^I This right does not exist if the order is made under (III) a scheme of re-development. It is therefore submitted, that tedious though it may be, the courts will have to distinguish between remodelling and a scheme of re-development if they are to comply with section I7(I)(i).

j. Employment has ceased

" (j) where the premises were let to the tenant by reason of his employment in the service of the landlord and such employment has ceased".

In Haroutunian v. Medz-Moroukian² it was held that the granting of an order under this rule is not dependent on the lawful termination of the tenant's employment. It is enough if the employment has in fact been terminated.

1. S.I7(I)(i)(ac) and S.I8(I).

2. [1962] 2 G.L.R.94.

k. Landlord has returned to Ghana

"(k) where the landlord was personally in occupation of the premises and has let the premises substantially furnished for a term during his absence from Ghana or that area of Ghana in which the premises are situated and has returned and requires the re-occupation of the premises for himself, so, however that no order granting the possession of, or the ejectment from, the premises shall be granted on or after the commencement unless the lease is in writing and sets out that the lease has been granted for a term during the absence of the landlord from Ghana or such area".

V. Effect of Eviction Order on Sub-tenants

An order for recovery of possession or of ejectment will not operate to affect the rights of any lawful sub-tenant in possession of the premises or any part thereof.¹ In Chahin v. Epope Printing Press,² the landlord was granted an order to recover premises from the tenant. On appeal, this order was set aside. The tenants then granted a sub-tenancy. On a further appeal, the second judgment was set aside. The landlord then sought to execute the order for recovery of possession against the sub-tenants. The sub-tenants commenced proceedings against the head-lessor claiming that they were lawful sub-tenants and therefore protected by section 11(5) of the Rent Control Ordinance, 1952. This contention was upheld at the High Court by Jiagge J., (as she then was), overturned by the Court of Appeal, and finally restored by the Supreme Court. The Supreme Court held that since the sub-tenancy was created after the first judgment had been quashed and at a time when no action was before the courts it was a lawful sub-tenancy. The sub-tenants were therefore protected.

1. Rent Act, 1963 (Act 220), S.17(5).

2. [1963] 1 G.L.R.163.

It is important to note — as Chahin v. Epope Printing Press illustrates — that only lawful sub-tenants are protected. In construing this provision the courts have taken the view that a sub-tenant whose tenancy was created in contravention of a covenant not to sub-let is not a lawful sub-tenant and therefore not protected¹. This, as has been argued,² need not necessarily be the case. The fact that a sub-tenancy was granted in breach of covenant should not, ipso facto, result in the sub-tenancy being unlawful.

VI. Security of tenure: fact or fiction?

It should not be supposed that the provisions of the Rent Act 1963 have resulted in tenants enjoying a more improved measure of security than they would have under the common law.³ It is a notorious fact that some tenants are evicted without a court order. One writer has written that tenants:

" . . . do not wish to incur the displeasure of their landlords; such displeasure could lead to ejectment that is often effective, even if illegal and in breach of the provisions of the Rent Act."⁴

In the survey⁵ of 2,000 residential tenants, 1631 said that they had been evicted from previous accommodation without a court order. Admittedly, this does not necessarily mean that the eviction was unlawful; for section 17 of the Rent Act, 1963 does not say that a tenant shall not be evicted without court order. What it does is to specify the circumstances in which a court order may be granted; it is still possible for a tenant to decide to vacate premises without insisting on an eviction order. What is therefore more

1. See Kuntoh v. Joseph (1955) D.C.(Land) '52-55, 341.

2. *supra.*, pp.147-148.

3. It is not been suggested that the security of tenure provisions of the Rent Act have had no effect at all., cf. all the cases discussed in which an eviction order was refused. But a lot more instances do not go to court.

4. Date-Bah, S.K., "Legislative Control of freedom of contract", in W.Ekow-Daniels & G.Woodman (eds), Essays in Ghanaian Law, Accra, 1976, University of Ghana, p.118, at 129-130.

important is that 1578 of the 1631 said that they did not wish to leave but had to. 187 of these were forcefully evicted; none of them complained to the police, and, as far as they knew, none of these landlords was prosecuted. And yet section 27(1) of Act 220 makes it a criminal offence for a landlord to do or refrain from doing any act which the terms of the tenancy impose on him, if it is aimed at inducing the tenant to quit the premises. It is disheartening, but not surprising, that none of the landlords seems to have been prosecuted; for section 27(1) was enacted because it was thought that landlords were getting away with illegal termination and harassment because tenants could not bear the cost involved in civil litigation. It was, therefore, hoped that placing the responsibility on the state would result in more vigorous enforcement and a consequent decline in the practice.

Many issues are raised by the ineffectiveness of the law—rent restriction, security of tenure, provisions against illegal termination and harassment, implied term, etc.—to achieve their desired policy - objectives. It is to a consideration of these issues that we now turn.¹

contd.

5. The survey was carried out by the present writer in Accra, Kumasi and Sekondi-Takoradi between June and December, 1978.

1. Last chapter.

CHAPTER NINE

THE SOCIAL CONTEXT AND ITS INFLUENCE ON THE LAW

" . . . the centre of gravity of legal development lies not in legislation, nor in juristic science nor in judicial decisions, but in society itself"¹.

Introduction

There has been a rather misplaced confidence in the miraculous capacity of law to achieve policy - objectives. Laws have been enacted without regard to what Friedman calls the "legal culture" within which these regulatory norms are to operate. "Legal culture" has been defined by Friedman as:

" . . . those values and attitudes in society which determine what structures are used and why, which rules work and which do not and why"².

Residential tenancy law in Ghana is an amalgam of translocated English common-law and "local"³ legislation (of dubious suitability) superimposed upon this translocated (and agricultural-based) foundation.

The law has been largely ineffective. Restriction of rental levels, security of tenure, implied terms and numerous criminal offence have largely remained dead-letter rules. And it is doubtful whether new law — implied warranty of habitability, repairing obligations on landlords — would fare any better. Measuring the effectiveness of law is not easy.⁴ "Effective laws," writes Allott, "should generally do what they are designed to do"⁵. The purpose of various aspects of residential tenancy law should therefore be noted. The

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1. Ehrlich, E., Fundamental Principles of the Sociology of Law, Cambridge, Mass., 1936, Foreword.
 2. Friedman, L.M., "Legal culture and social development", (1969) 4 Law and Society Review 29.
 3. The 'locality' of these enactments is suspect. The Conveyancing Decree, 1973, which is supposed to be suited to the present-day needs of Ghana (vide: the Memorandum to the Decree) is at most points a verbatim repro-

(Cont.)

purpose of law on rent restriction is to restrict rental levels, that on security of tenure to provide the tenant with a secure home and to ensure that the tenant is not evicted otherwise than in accordance with law, that prohibiting the payment of premiums and advances to ensure that these are not demanded and paid, that requiring the provision of rent books and receipts to ensure that this is done. A law requiring a landlord to let premises in a condition of habitability is designed to prevent the letting of unlivable premises; and an implied term prohibiting sub-letting or assignment without the consent of the landlord is designed to stop such practices occurring. The aim of the law is not to punish breach. The multifarious criminal offences created by residential tenancy^{law} are designed to induce compliance with the law; it is not the raison d'etre of the law to punish offenders but to induce compliance.

Law is purposive activity¹. Kelsen's view that law is primarily addressed to officials to impose sanctions in certain cases² is rejected. The difficulty involved in measuring compliance for different types of law; criminal law, facilitative law, mandatory, law, prohibitory law and institution-establishing norms, has been noted by Allott³.

Though recognising the difficulty involved in measuring law - effectiveness and the limited nature of the fieldwork carried out, the available evidence indicates that there is a low level of compliance with the legal rules⁴. Most

duction of the English Law of Property Act, 1925.

4. See Allott, A.N., The Limits of Law, op.cit., pp.VIII - IX, 28-32.

5. *ibid.*, p.29.

1. See Fuller, L.L., The Morality of Law, New Haven, 2nd (edn.), 1969; Allott, A.N., The Limits of Law, op.cit.,; Seidman, R.B., The State, Law and Development, London, 1978.

2. See Kelsen, H., General Theory of Law and State, New York, 1961, pp.57-61.

3. Allott, A.N., The Limits of Law, op.cit., pp.28-32.

4. *supra*, pp.131, 170-180, 228-230, and Chaps. 7 & 8.

of the norms on this branch of the law — certainly those on restriction of rental levels, security of tenure, provision of rent cards and receipts and restrictions on payment of advance and premiums — will, in Allott's terminology, be said to be frustrate. Allott defines a frustrate norm as:

"A norm or law omitted in due form, a valid norm with zero or minimal compliance"¹.

One further example may be cited as evidence of the minimal compliance with aspects of this branch of the law. In the recent allowances announced for members of parliament of the Third Republic, a housing allowance of £1,500 a month was granted to M.P.s². This was so despite the fact that by A.F.R.C.D.5 the maximum rent for a three bed-room house in Accra (where parliament sits) is £200!³ And this is the maximum; a two-room house should not attract more than £150 a month and a three-roomed, semi-detached not more than £175 a month⁴. It is considered unlikely that M.P.s require something bigger than a three bedroom house for which there is no maximum rent fixed. It is submitted that this is a seal of acknowledgement by the executive and the legislature that they are aware that whatever the black-letter rules of the law may require, in practice rents are much higher.

What are the reasons for the failure of the law to achieve its desired policy-objectives? It is submitted that the answer lies in the concrete socio-economic and political context within which the law seeks to operate.

It has been noted that the rent control scheme has been inadequately and inefficiently administered⁵. It is argued by some that the ineffectiveness of the scheme — a large part of residential tenancy law — is due to this

1. Allott, A.N., The Limits of Law, op.cit., p.309.

2. See West Africa, No.3294, 8th September 1980, p.1732.

3. S.8(3).

4. SS.8(1) & (2).

5. *supra*, pp.265-278.

administrative factor. It was intimated earlier that while conceding that the scheme has been ineptly administered the underlying problems are more fundamental and deep-rooted. Indeed it would be surprising whether in the concrete realities of the Ghanaian situation the scheme is otherwise than ineptly administered.

The underlying causes of the ineffectiveness of the present law (and why ambitious reform is not being advocated) are to be found in the nature of the housing situation and the characteristics of the rental sector, ineffective communication of law, an economic situation characterised by shortages and the failure of other forms of control, institutionalised and pervasive corruption, lack of participation by the citizenry in the political process and a consequent disenchantment with, alienation from and delegitimation of the polity, and the culmination of all these—hyperinflation of acute proportions.

It must be emphasised that these issues must be looked at as a whole. For reasons of analysis, presentation and manageability an attempt has been made to disengage and analyse one part at a time. But they form a complete whole. It is, therefore, not being argued that the ineffectiveness of the law is attributable to each particular one of them. It is not being argued, for example, that a landlord decided to charge a tenant to pay rent higher than legally prescribed in response to the realities of supply and demand. What is being argued is that all these factors taken together have induced our primary role-occupants (but also our secondary role-occupants) to break (or is it ignore?) the law.

A. Communication of Law

"A law or "legal system", writes Allott, "is a system of communication"¹. A law or system of law (like residential tenancy law) must be communicated to role-occupants—landlords and tenants mainly, but also officials of the law

1. Allott, A.N., The Limits of Law, op.cit., p.5.

— like magistrates, rent officers and lawyers—if it is to have an effect on behaviour¹. And that—influencing the behaviour of role-occupants—is the test of the effectiveness of residential tenancy law, not so much how many people are convicted of the multifarious offences created by the law.

Law is purposive activity. It must thus be stated that the primary role-occupants of residential tenancy law are landlords and tenants. It is the behaviour of these actors that the law seeks to influence. They are the all-important people. Lawyers, rent officers and magistrates perform the secondary function of advising landlords and tenants on what the law is or administering the law when there is a breach. But the purpose of the law is to regulate conduct—to change, modify or influence behaviour, activity or institutions. Legal messages must thus be directed, first and foremost, to landlords and tenants. The Kelsenite view² that the primary norm is that addressed to the judge or other official to execute sanction for breach and that it is the secondary norm which is addressed to the role-occupant and that the latter is only an epiphenomenon of the former is rejected.

The rules for the communication of law in Ghana are derived from English practice. The effectiveness of these rules—official publication and serialisation followed by ignorantia juris—even in their birth-place have been questioned by Allott³. Allott notes the lack of publicity that attends the parliamentary process—the real business of law-making as opposed to trivialities about late-night sittings, fillibustering, etc.

That these rules are inadequate for England raises serious questions for legal science in Ghana. For as both Allott⁴ and Seidman⁵ note, in England

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1. See Seidman, R.B., The State, Law and Development, op.cit., pp.105-128; Allott, A.N., The Limits of Law, op.cit., pp.28-39, 73-97; Friedman, L.M., Law and Society, New Jersey, 1977, pp.111-115.
 2. Kelsen, H., General Theory of Law and State, New York, 1961, pp.57-61; Pure Theory of Law, Berkeley, California, 1970, pp.54-58.
 3. Allott, A.N., The Limits of Law, op.cit., pp.73-81.
 4. *ibid.*
 5. Seidman, R.B., The State, Law and Development, op.cit., pp.105-128.

and the industrialised countries enactment of legislation is sometimes followed by official government publicity through advertising or propaganda in the press and on radio and television (note that 98% of households in the U.K. have at least one television set).

Another factor is that in addition to lawyers (who were the traditional information-brokers), these days enactment of some legislation sparks of publication by an army of agencies and organizations. Thus in the particular field of residential tenancy law, enactment of legislation in the U.K. would provoke the print of handbooks, journals, articles, leaflets, handbills, etc. by groups like Shelter, the Legal Action Group, the Housing Aid Centre, Child Poverty Action Group, Law Centres and local authorities. Advice on these matters could also be received from Citizens Advice Bureaux, phone-in programs and housing departments of local authorities. Despite this impressive array of infrastructural support, Allott notes a large measure of anomia ("ignorance or lack of Law among those members of a society normally subject to it")¹ in England and Wales². Allott's view, as he admits, is impressionistic and not based on empirical research into popular knowledge and understanding of laws. But his experience as a law teacher of some 30 years and also as a Justice of the Peace entitles us to accord some weight to his view. In the particular field of an aspect of residential tenancy law, what research there is supports the view that there is a large measure of anomia among the people of England and Wales. In a survey carried out in Islington, London, under the supervision of Michael Zander, it was found that a significant proportion of those questioned (between one-third and half) had never heard of the Rent Acts, the rent officer and the rent tribunal!³ And a third of those who have heard of these strange legal animals do not know what they do!⁴.

1. Allott, A.N., The Limits of Law, op.cit., p.309.

2. *ibid.*, pp.73-81.

3. Zander, M., "The unused Rent Acts", New Society, 12th September, 1968.

4. It is thought likely that the level of anomia today would have been reduced as a result of the work of the agencies noted.

It should be plain by now that the translocation of such a system for the communication of law to Ghana and its continued use is singularly ill-advised.

I. Language as a Communication problem.

Ghana has no indigenous national language. English is the official language. Statutes, regulations and law reports appear only in English. A sizeable number of landlords and tenants in urban Ghana are illiterate. There are no available figures for urban Ghana; but for the country as a whole the 1970 population census showed that 56.8% of the total population aged six years and over have never been to school. The proportion of illiterates in the urban areas will be lower than the national average, but it would still be significant. The effect of this factor alone in limiting the effectiveness of law will be considerable.

But it should not be supposed that the lot of the literate landlord or tenant is markedly better. It has been noted that in the field of residential tenancy law the landlord and the tenant are the primary role-occupants. This self-evident fact does not appear to have been grasped by the law-maker. It is doubtful whether a middle school leaver, or a landlord or tenant who has been to secondary school, or even a graduate will understand the provisions of the Conveyancing Decree, 1973, on the burden and benefit of covenants running with the tenancy or the reversion. Law (including residential tenancy law) is expressed in lawyers' language — 'legalese'. This:

"has been sharpened and made precise as a means of communication within the legal profession. It has developed as a means to the goal of resolving legal conflicts through the intervention of judges and lawyers"¹.

1. Aubert, V., "Some social functions of legislation", (1966) 10 Acta Sociologica 99.

The law is not written as a programme of social action, but as a tool for conflict-resolution. And this is so despite the fact that the primary aim of the law is to mould and regulate the conduct of a lay audience without legally trained intermediaries. In an article on the Rent (Amendment) Decree, 1973 (N.R.C.D.158), Gordon Woodman suggested that a legal officer be employed by the Ministry of Information and charged with the task of preparing leaflets, etc., explaining such legislation in more understandable English to the general public¹. Five years after this suggestion was made (when the present writer visited Ghana) this simple but sensible suggestion has not been implemented. It is thought unlikely that it has now been implemented.

But it should not be supposed that if statutes were made more comprehensible then the understanding of landlords and tenants would be enhanced. There is no code on residential tenancy law. The Conveyancing Decree, 1973 (N.R.C.D.175) and the various rent control legislation assume a knowledge of the common law of landlord and tenant. A reading of the security of tenure provisions of the Rent Act, 1963 (Act 220) without a knowledge of the common-law rules for the termination of tenancies is pretty useless. In fact a reading of the security of tenure provisions will not yield much without a reading of the judicial decisions on the provisions. And it is a bit far-fetched to expect landlords and tenants to spend their leisure-time reading the Ghana Law Reports.

1. See Woodman, G.R., "The recent rent control legislation", Legon Observer (1973) Vol.VIII, No.9, p.198, at p.200.

II. Lack of infrastructure

In the United Kingdom, the United States and the industrialised West the role of information - broker was traditionally performed by lawyers. In Ghana there are far too few lawyers to perform this task satisfactorily. At Independence in 1957, there were three hundred lawyers for a population of eight million. Moreover most lawyers in Ghana see themselves as advocates rather than as solicitors, counsellors or advisers¹. Lawyers therefore spend a very high proportion of their time in court or preparing for court cases (litigation-work generally) rather than as information-brokers or doing solicitors' work-like drafting leases.² Nor has the profession the support of specialised legal services - journals, digests, periodicals, reviews, etc. - which support the lawyer's information-broker role in the United Kingdom and the United States. There is no book on residential tenancy law. The last issue of the Ghana Law Report was in 1978. There are two periodicals the Review of Ghana Law and the University of Ghana Law Journal. The last issue of the Review of Ghana Law was in June 1978. The publication of the University of Ghana Law Journal is even more infrequent — the latest one being for 1977.

It was noted that in the United Kingdom (in more recent times) groups other than lawyers have played a major part in the communication of residential tenancy law.³ Ghana has no equivalents for Shelter, the Housing Aid Centre, the Legal Action Group and the Citizens Advice Bureau.

The role of the press and media in the communication of law is also likely to be greater in the industrialised countries. Fewer people have access to radio and television in Ghana than, say, in the United Kingdom.⁴

1. See Luckham, R., "The economic base of private law practice", the Essays in Ghanaian Law, op.cit., p.177, esp; pp.182-191.

2. *ibid.*

3. *supra*, p.339.

4. Unfortunately the statistics for Ghana are not available.

The same would be true of newspapers. In fact, in recent years newspapers have become very scarce commodities even in Accra. The situation in the other regional capitals and urban centres is likely to be worse.

It is thus clear that the infrastructure that supports the communication of law in the industrialised countries is lacking in Ghana. The result of this has been a large measure of anomia.

III. The level of anomia

Various indices of the level of knowledge about residential tenancy law was collected during the survey carried out by the present writer. Five hundred landlords and two thousand tenants were interviewed. 60% of tenants and 65% of the landlords interviewed have heard about rent control. The numbers however fell drastically when it came to the Conveyancing Decree, 1973. Only 2% of tenants and 3% of landlords have heard about the Conveyancing Decree, 1973.

Though a high proportion of landlords and tenants have heard about rent Control, the numbers which had a knowledge of the content of the law was much lower. Only 5% of tenants and 7% of landlords knew what the fixed rent for premises were¹. In fact, there was often an expression of incredulity when they were told what the standard rent was — the usual reaction being: "the government is not serious"!

That there is a large measure of anomia among landlords and tenants was recognised by the Kwaku Bonsu Committee appointed to enquire into the operation of the Rent Control Ordinance (NO.2), 1952. The Committee which sat in all parts of the country and heard evidence from landlords and tenants, rent assessment committees, lawyers, etc., reported:

"There appears to be, however, some ignorance on the part of landlords and tenants as to their rights and obligations and a system by which landlords and ten-

ants can be educated as to their duties and rights is clearly necessary"¹.

It may be pointed out that though the Committee reported in 1962 the system of education recommended has not been established.

IV. Consequences of poor Communication

"Unknown law", writes Allott, "is ineffective law"². A law cannot have the desired effect (at least not consciously) unless it is communicated to role - occupants³. It is thus submitted that one of the reasons for the largely ineffective operation of residential tenancy law is the failure to communicate.

But uncommunicated law is law nonetheless. Fuller's view that uncommunicated law is not law is rejected⁴. It confused two different levels of analysis: validity and effectiveness. Validity is established by recourse to the rule of recognition⁵ or the Grundnorm⁶. It is, of course, not impossible for a rule of recognition or Grundnorm to require communication as part of the test of validity; but this is not necessary. Effectiveness, on the other hand, is always dependent on good communication⁷.

B. The Housing Situation

In analysing the housing situation in urban Ghana, the following characteristics were noted⁸:

- (1) that there is an acute housing shortage and consequent over crowding;
- (2) that as a result of continuing urbanization and low-level housing construction the situation is worsening;
- (3) that the rented accommodation market is largely non-socialised (i.e., it is controlled by private interests), attempts at socialization having largely failed;

1. Report of the Committee of Enquiry into the operation of the Rent Control Ordinance (No.2), 1952, Accra, 1962, p.19, para.21.

2. Allott, A.N., The Limits of Law, op.cit., p.73.

3. Seidman, R.B., The State, Law and Development, op.cit., pp.105-128; Friedman, L.M., Law and Society, op.cit., pp.111-115; Allott, A.N., The Limits of Law, op.cit., pp.73-81.; Mutungi, O.K., "The Communication of law under conditions of development: the Kenya case", (1973) 9 East African Law Journal II.

- (4) that the private rented accommodation market is the dominant feature in the housing market, public housing have made minimal progress and owner-occupation becoming increasingly difficult because of lack of finance; and
- (5) that even where on the face of it an area of the market seems to be socialised, it may in practice form part of the private rented sector.

These characteristics are crucial in the non-functioning of the present law and should serve as a timely reminder to any attempt at law reform.

Much of residential tenancy law—rent restriction, security of tenure, implied terms, provision of rent books and receipts, etc.—attempts to regulate and modify the results that would otherwise flow from the economic forces of supply and demand. But since demand far outstrips supply and the supply side is privately - controlled the bargaining position and the power of the landlord vis-a vis the tenant is greatly strengthened. In his need to have a roof over his head the Ghanaian tenant has, for example, been prepared to pay far in excess of the legal rent. The landlord charges a rent higher than the legal rent because (for one reason) he knows he controls a scarce and essential commodity. The tenant is prepared to pay because he needs a house and there is not much chance of his getting one through the public sector or by 'owner-occupation'. He is also in competition with prospective tenants. There are thus two parties who (for different reasons) are induced to break (or, is it ignore?) the law because the pull of the realities triumph over the push of the law.

(Cont.)

4. Fuller, L.L., The Morality of Law, op.cit., pp.38-41.
5. Hart, H.L.A., The Concept of Law, London, 1961, pp.97-107.
6. Kelsen, H., General Theory of Law and State, New York, 1961.
7. *supra*, pp.337-346.
8. *supra*, pp.47-56.

There is a sociological dimension to this argument which must be highlighted. It is that where there are more people seeking a facility than can be provided^{for}, there is a strong inclination to offer bribe in order to obtain the facility¹. This partly explains why there is so much corruption in Ghana (because many goods and facilities are in scarce supply) and why price control and other forms of control (like import licence control and foreign exchange control) have been largely ineffective. In the particular case of residential tenancy law, the bribe offered (in order to secure accommodation) may take the form of a preparedness to pay more than the legal rent or non-insistence on legal rights (like a landlord's duty to repair).

C. Failure of other forms of control and types of law

I. Moneylending operations

Moneylending operations in Ghana are sought to be controlled through the Loans Recovery Ordinance², 1918 which gave the Ghanaian courts the right to re-open, *examine and alter the terms of a moneylending contract*, and the Moneylending Ordinance, 1941³ which sought to prohibit moneylending at a profit by *unlicensed persons*. The *combined effect* of these two enactments is to seek to subject moneylending to considerable legal control.⁴

Despite the *apparently strong legal regime of controls*, the paper-rules have had little effect on the ground. Bank credit and housing finance lending are scarce in Ghana. It may not go to the person with the strongest case. A lot of people are not sufficiently credit-worthy. These needy victims of the system have recourse to moneylenders. A dependency

1. See de Graft-Johnson, K.E., Administration and Corruption in Ghana, Unpublished paper prepared for the conference on Administrative Reform and Corruption at the Institute of Development Studies, University of Sussex, Brighton, March 12-14, 1975, at pp.11-12.

2. Cap.175 (1951 Rev.).

3. Cap.176 (1951 Rev.).

4. See Date-Bah, S.K., "Legislative Control of Freedom of Contract", in Essays in Ghanaian Law, op.cit., pp.121-122, *for a fuller account*.

5. See Date-Bah, S.K., op.cit.; Kludze, A.K.P., Ewe Law of Property, op.cit. 245-248; *supra*, pp.76-81.

relationship based on need is created. The borrower — even if aware of his legal rights — does not want to jeopardise his only source of credit by resort to law¹. The lending contracts are quite unconsonable². Since a person building a house may have had to take such a loan, the propensity to charge the highest attainable rent is increased. But even if a landlord had not taken such a loan, the ineffectiveness of controls in one part of a socio-economic and legal system snowballs into other areas as anarchy becomes the accepted norm.

II. Price Control

The chequered history of price control starts with the enactment of the Control of Prices Act³, 1962³. This was at a time when shortages of commodities had started occurring as a result of foreign exchange difficulties. A consequence of these scarcities was that to allow market force to operate unbridled would lead to very high prices. In 1965 the offence of hoarding was created⁴. The present regime on price control is established by the Price Control Decree, 1974 (N.R.C.D.305). The Decree empowers the commissioner responsible for Trade, acting on the advice of the Prices and Incomes Board, to stipulate the maximum prices for goods.⁵

Attempts at legislative control of price are not limited to sale of goods contracts. Wide-ranging regulatory powers are conferred on the Prices

1. See Date-Bah, S.K. "Legislative control of freedom of contract", in Essays in Ghanaian Law, op.cit., pp. 121-122; Kludza, A.K.P., Ewe Law of Property, op.cit., pp. 245-248.
2. ibid.

3. See Date-Bah, S.K., op.cit., and Killick, T., "Price controls in Africa: the Ghanaian experience", (1973) 11 Journal of Modern African Studies 405.

4. See Control of Prices (Amendment) Act, 1965, S.1.

5. S.1.

and Incomes Board by the Prices and Incomes Board Decree, 1972 (N.R.C.D.119). Pursuant to these powers the Board has issued the Prices and Incomes Regulations, 1973 (L.I.805). The regulations provide that no person shall increase the price of any goods or services whatsoever without the prior written consent of the Board¹. It has been pointed out that the Board has neither the personnel nor the resources to perform this task and that it is preposterous to suppose that this Accra-bound, centralised body *can keep all prices down.*²

It can be seen that on paper there is a tough legal regime for the control of prices.* The reality is very different. The controls have been largely ineffective. Kalabule³ is the order of the day. Prices are in most cases far above the controlled price. When the present writer visited Ghana in 1978 the controlled price for a bag of cement was ₵16, but the average price at which one could actually buy it was between ₵50-₵60. This is due to the periodic shortages. It is also the result of the Kalabule — which involves shop managers and all⁴. The goods are therefore seldom seen in the supermarkets and big retail outlets. This was the judgment of Tony Killick in 1973 on the price control system:

"The controls were mostly ignored. Only in shops located in the towns was there any significant observance; in the rural areas, and on the urban markets, they were almost completely disregarded"⁵.

1. Reg.1(1).

2. *supra*, pp.256-258.

3. See *infra*, pp.

4. See "Price control and trade malpractices", (1980) XII The Legon Observer 201.

5. "Price Controls in Africa: the Ghanaian experience", (1973) 11 Journal of Modern African Studies 405, at 423.

* A measure of liberalization and decontrol has been introduced since the script was written. This does not, however, affect the gravamen of the argument as the controls had been largely ineffective.

By 1976, the socio-economic situation having worsened, Date-Bah's judgment was even more damning:

"These rules have been effective only in the supermarkets and retail outlets of the established large distributors. In the marketplaces, the small kiosks and the small shops of the petty traders from whom the majority of Ghanaians buy their consumer goods, the price control regulations are of little effect. Even in the heart of the cities; in Accra, Kumasi, Sekondi-Takaradi, Cape Coast, the market women sell goods much above the controlled price largely with impunity. The city dwellers are so glad to come by some of the goods which periodically become short that the price at which they buy them becomes not as important as the access to the goods"¹.

It may be pointed out that other forms of prices — transport charges, tailoring charges, foodstuffs, etc., — have proved incapable of being controlled.

The effect of the failure of other forms of price control on residential tenancy law is that landlords realizing the failure of other controls and knowing that the goods and services they have to buy are being sold at prices far higher than the controlled prices have little incentive to follow the legal rules². They are not persuaded.

That there is a relationship between the various controls in a society (and that failure in some parts have a knock - on effect in the others) is evidenced by the fact that in the heyday of the A.F.R.C. "revolution" prices in all spheres fell³. When Ghanaians thought they had a government which could

1. Date-Bah, B.K., "Legislative control of freedom of contract", in Essays in Ghanaian Law, op.cit., p.118, at 124.
2. The commonest reaction when landlords were told that the controlled rent for their premises were (during the field research) was: "The government is not serious". When law becomes ridiculous the urge to break (or rather ignore) it is increased: See de Graft-Johnson, K.E., op.cit.
3. See The Legon Observer, Vol.XII No.9, 27 June - 10 July 1980, p.201; Ghanaian Times, June 22 1979, p.12; Daily Graphic, June 21 1979, p.16. This is why liberalization and decontrol in some spheres would further weaken the moral authority of controls in other spheres.

effect controls in all areas and when prices started falling some landlords voluntarily reduced rents¹. The fact is that no group is prepared to be law-abiding if anarchy prevails in other sectors. It is interesting to note that all prices in Ghana have gone back to their "pre-revolutionary" heights².

III. Other types of law

The system of direct taxation has been largely ineffective. Many people do not pay their taxes. The problem is greatest among the self-employed. This has been largely due to the difficulty of assessment as most of these self-employed do not keep proper accounts³, and to the inefficient system of collection. The law has reacted to this by laying down standard rates of tax for certain classes of people. Thus lawyers, say, of five years' standing may have to pay £2,000 a year while lawyers of more than ten years' standing may have to pay £5,000. Tailors, bakers, seamstress, etc., all have standard rates. The fairness of such a system is questionable. But even more important is the fact that a lot of people do not pay any tax at all. It was even suggested recently (by the government, no less) that the Chief Justice has not paid his taxes⁴, though this was strenuously denied by the Chief Justice⁵.

It also seems (from reports from friends, Ghanaian newspapers and West Africa) that crimes like armed robbery and car stealing are on the increase. Corruption is widespread and pervasive⁶.

There is thus a large measure of anarchy (lack of law or lawlessness) in Ghana today.

1. *ibid.*

2. See "Price Controls and trade malpractices", (1980) XII The Legon Observer, p.201.

3. They are unlikely to declare the correct figures even if they kept them.

4. See West Africa No.3293, 1st Sept.1980, p.1677.

5. See West Africa No.3294, 8th Sept., 1980, pp.1689-1693.

6. See *infra*, pp.351-356.

IV Consequences of anarchy

Law, Allott has argued, is a confidence-trick, and:

"Confidence diminishes or disappears if the law is cast into disrepute through nonobservance of its laws. This general failure of conviction or confidence in law is now widespread in Africa on the part of subjects of the law"¹.

Anarchy breeds anarchy. Non-compliance with laws in other parts of the system (or an assumption that this ~~is~~ has diminished the authority of residential tenancy law to persuade its subjects to conform to it. No group is willing to comply with the law if it is not confident that others will do (or are doing) likewise. This is an important revelation on the sociology of law - effectiveness. The laws of a society have an inter-relationship. Breakdown in enforcement of, or non-compliance with one area soon spreads to other areas as confidence in law (and in society) is gradually eroded.

D. Corruption

Corruption has no single commonly-accepted definition². It includes bribery, extortion, nepotism, profiteering, hoarding, embezzlement and the general wrongful use of public or private property, office, or influence³.

The aim of this section is to demonstrate how corruption has served to limit the effectiveness of residential tenancy law. The causes of and factors promoting corruption will therefore not be analysed. It may be just noted that there are both structural and cultural factors promoting corruption⁴.

1. Allott, A.N., The Limits of Law, op.cit., p.39.
2. See Heidenheimer, A.J. (ed), Political Corruption: Readings in Comparative Analysis, New York, 1970.
3. See Report of the Commission of Enquiry into Bribery and Corruption, Accra, 1975 (P.D.Anin, Chairman).
4. See Report of the Anin Commission, supra; Werlin, H.H.; "The roots of corruption: the Ghanaian case", (1972) 10 J. of Mod.Afri.Studies 247; Wraith, R., & Simpson, E., Corruption in Developing Countries, London, 1963; Mends, E., "Traditional values and bribery and corruption", (1970) 5 The Legon Observer 13; Ocran, T.M., Law in Aid of Development, Accra, 1978; Seidman, R.B., The State, Law and Development, op.cit., pp.167-185.

I. The pervasiveness of corruption

It is difficult to measure the degree of corruption prevailing in a country. One difficulty is the problem of definition. Another is that corruption belongs to that area referred to by criminologists as "hidden crime". The magnitude of the problem was not lost on the Anin Commission — a commission established to enquire into the problem of corruption in Ghana. The Commission sat for about three years; it toured the whole country and heard evidence and received memoranda from a large number of people and institutions. But in its Final Report the Commission said:

"We were conscious throughout our enquiry, therefore, that we were perceiving a kind of iceberg. We could only describe and measure accurately the part above the sea. The greater bulk submerged below the sea we were aware of but could not accurately describe. We could, however, make certain reasonable assumptions"¹.

The extent of corruption in Ghana cannot therefore be demonstrated by factual and statistical evidence of the type normally acceptable for scientific generalization. But there is evidence of some scientific credibility. Reports of various commissions and committees of enquiry attest to widespread corruption in various sections of the society². The Report of the Commission of Enquiry into the operation of the State Housing Corporation and the Committee of Enquiry into alleged irregularities and malpractices in the operations of Tema Development Corporation have been examined at some length and both disclose widespread corruption³. The Anin Commission reported:

1. *supra*, chapter 1, para.13.

2. See. Report of the Commission of Enquiry into Irregularities and Malpractices in the grant of Import Licenses, Accra, 1967; Report of the Commission to Enquire into the Kwame Nkrumah Properties, Accra, 1966; Report of the Commission into the Affairs of NADE Co.Ltd., Accra, 1966; Report of the Commission to Enquire into the assets of specified persons (Chairman, Sowah, E.N.P.), Accra, 1968 and 1969.

3. *supra*, pp.47-56.

"In spite of many commissions of enquiry since 1953, and especially since 1966, to expose and deter the practice, corruption is widely prevalent at all levels of society"¹.

The Report goes on to say that corruption is "pervasive and deep-rooted"² and that it is "endemic throughout the whole society"³.

As far back as 1948, the Watson Commission reported:

"It would be idle to ignore the existence of bribery and corruption in many walks of life in the Gold Coast admitted to us by every responsible African to whom we addressed the question. That it may spread as further responsibility is devolved upon the African is a possibility which cannot be denied"⁴.

In 1964, the Akainyah Commission reported:

"It is unfortunate and pathetic that the love of money has become an obsession with some of us, and drives us to any length to get rich quick without stopping to think of the consequences. So long as we can get the money, we do not care whether or not the country is plunged into bankruptcy"⁵.

And in 1967 The White Paper to the Ollennu Commission Report said:

" . . . the attendant bribery and corruption were not spasmodic but organised and systematically operated through agents at different levels of society, involving various persons, some of them supposedly respectable and obviously unsuspected"⁶.

In addition to the reports of the commissions of enquiry may be added the large folklore of corruption⁷.

1. op.cit., chapter 3, para.58.

2. op.cit., chapter 3, para.59.

3. op.cit., chapter 5, para.63. The Report continued: "this Commission is satisfied that the practice of corruption is indeed widespread in this country, and that it affects practically every sector of public life where the possibility of corruption exists.

4. Report of the Commission to inquire into disturbances in the Gold Coast London, H.M.s.o., 1948, p.8.

5. Report of the Commission of enquiry into alleged irregularities and Mal-

As evidence of this folklore the following examples are cited. J.A.Peasah, in an article in The Legon Observer, wrote:

"There is no repentance and there is always the preparedness to seize the earliest opportunity for some more looting"¹.

Noting that corruption is not restricted to politicians. Attu Kwamena adds:

" . . . those who held various degrees of power in the civil service, in commercial concerns, in corporations, in political parties, in traditional authorities, and so on"².

Refusal to handle letters, files or claims, or to process applications, etc., unless "something" is given to the typist, messenger or official is widespread. Police officers demanding money before allowing cars and lorries to pass through road blocks or for overloading or other breach of regulations is common-place!³ Sharpston has written:

"In 1969, it was reliably reported that a quarter of all Ghana's consumption of cigarettes was satisfied by smuggling On top of that, a third of all drugs and supplies of the Ministry of health are, at a conservative estimate, stolen or diverted"⁴.

So pervasive and widespread is corruption that Le Vine has written about the emergence of a "culture of corruption"⁵, and Peasah of "institutionalised corruption"⁶. Outlining the characteristics of the culture of corruption, Le Vine writes:

practices in connection with the issue of import licences, Accra, 1964, p.38
6. W.P.No.4/67, Accra, 1967, p. 6.

7. The phrase folklore of corruption is borrowed from M. rdal, G., "The 'soft state' in underdeveloped countries", (1968) 15 U.C.L.A. Law Rev.1118.

1. "Institutionalized Corruption" (1967) 2 The Legon Observer.11

2. "The cure for corruption in Ghana", The Echo, 12 April 1970, p.7.

3. See the Report of the Anin Commission, op.cit.

4. Sharpston, M.J., "The economics of corruption", New Society, London, 26 Nov.1970, p.44.

5. Le Vine, V., Political Corruption: the Ghana Case, Stanford, 1975.

"Bribery, graft, nepotism, favouritism and the like have become common-place at all levels of officialdom; and what is more much of the public had come to expect officials to conduct their business in a spirit of subterfuge, dishonesty and mendacity on all sides"¹.

The pervasive and institutionalised nature of corruption and approval of, acquiescence in or resignation to the problem is evidenced by the growth of a new indigenous term, Kalabule. This term encompasses all corruption—practices like profiteering, hoarding, bribery, nepotism, favouritism, queue-jumping, "chit-contracting, etc., Kalabule may be defined as pervasive and institutionalised corruption. *The emergence and* growth of this term and its use by a quiescent society seems to be the final seal of recognition (approval?) by a society riddled with and crippled by corruption of a pervasive and cankerous kind.

II. Corruption and law

Law, it has been argued, is a confidence-trick. Few phenomena are as potent and dangerous in their capacity to erode confidence in law and in society as corruption. It has been noted, at various points of this thesis, that ad hoc criminal offences have been created by residential tenancy law. It is therefore interesting to note that the Anin Commission reported police officers (who enforce the criminal law) as being "notoriously corrupt"². In fact a former Inspector-General, in his evidence to the Commission, admitted that his men were corrupt³. Allegations of corruption against rent officers is also rampant. In an article in The Mirror, S.N.Essien wrote:

6. *supra*.

1. *supra*, pp.12-13.

2. Final Report of the Commission of Enquiry into Bribery and Corruption, Accra, 1975, Chapter 5, para.67.

3. *ibid*.

"There are occasions when such officials appeared to have allowed their conscience to be influenced by certain considerations thereby giving credence to the accusations that they are biased in their judgment"¹.

Allegations of corruption against rent officers are not proved. But that is not the important point. It is the folklore—the commonly-held belief—that they are corrupt that is important. It is not necessary to adduce scientifically - valid evidence of corruption (though the reports of the various commissions of enquiry is formidable); it is enough that a folklore of corruption exists—that people think corruption is widespread. It results in the erosion of confidence in law and in society and induces people not to conform with the law nor to report breaches of it. Commenting on the folklore that rent officers are corrupt, Essien writes:

"This is why ^{the} majority of tenants appear to have little interest in the Rent Control Department"².

Corruption and ~~for~~ a folklore of corruption begets more of the same. Commenting on the folklore of corruption and the dire consequences it has for Ghanaian society, the Anin Commission reported:

"If people are conditioned to believe that success in their society is seldom achieved with clean hands, but at the same time, they are under pressure to succeed in business or in their normal vocations, they are not likely to be scrupulous or squeamish about their methods"³.

1. Feb.21, 1979, p.6; See Act 220, S.24.

2. The Mirror, 2nd Feb.1979, p.6

3. op.cit., chapter 3, para.54.

E. Political Legitimacy

Ghana is still grappling with the problem of the legitimacy of the polity. This is due to lack of participation in the political process and lack of mobilization for national policy-goals, and to the fact that the polity has failed to satisfy the aspirations of its citizens.

I. Political participation

In the period between World War II and independence mass participation in politics was tremendously increased¹. The party which tapped and articulated the diverse interests involved in the drive for social, economic and political mobility and the intense anti-colonial nationalism was the C.P.P., which eventually led the country to independence.

Some writers on Ghanaian politics have claimed that the C.P.P. was a well-organised party at the grassroots-level in the late 1950's². But this optimists' view of the golden period of Ghana politics has come under increasing attack³. Fieldwork observation, interviews with party officials and a perusal of party records at both the local and national level, including an examination of party finances and membership, led Kilson to challenge the optimists' view. He concludes that:

" . . . the C.P.P. had minimum local organisation in the late 1950's, albeit adequate to win elections"⁴.

1. See Austin, D., Politics in Ghana, London, 1964; Apter, D., Ghana in Transition, Princeton, New Jersey, 1972.

2. *ibid.*

3. See Zolberg, A.R., Creating Political Order: The Party-States of West Africa, Chicago, 1966, esp. Chaps.4-5; Kraus, J., "Political change, conflict and development in Ghana", in Foster, P. and Zolberg, A.R., (eds). Ghana and the Ivory Coast, Chicago 1971, p.33; Kilson, M., "The grassroots in Ghanaian politics", Ghana and Ivory Coast, *supra*, p.103.

4. *supra*, p.114.

Aristotle Zolberg, the foremost critic of the optimists' view, notes that though the early observers saw party activity at its height, bringing together varied interests, these were not held together by the party structure, but the common interest of the moment¹. There was mass mobilization, but no organizational base strong enough to sustain it². It should be remembered that the major issue during the nationalist period focussed on the question of governing personnel rather than on governing procedures.

But even this period of mass mobilization in Ghana politics marked the initial spurt prior to the decline of mass participation in the political process. Once the question of political leadership was settled (or at least set aside between elections) mass participation was not encouraged. In the period 1958-66 the C.P.P. forsook organisation and popular participation in favour of the development of a personality cult³. As Tawia Adamafio suggested:

"We must look upon the Osagyefo as our saviour and messiah. Let us exploit him for the benefit of the nation. Let us make an institution out of him"⁴.

The C.P.P. became more and more authoritarian. Local branches were not encouraged. Institutions like the Trades' Union Congress, the United Ghana Farmers' Council and the National Council of Women were transformed into organs of the party. The establishment of these para-party tributaries was

1. *supra*, p.34.

2. They failed to heed to Weber's advice (vide: Weber, M., The Theory of Social and Economic Organization, New York, 1904, p.33) that in a modern state legitimacy may last only if institutionalised.

3. See Kilson, M., *supra*.

4. Ghanaian Times, 10 April 1961, p.6.

harmful to grassroots participation, particularly at the local level. Moreover the party (and the government) did not impose effective accountability on the monopoly position of these para-party organisations at the local level. This left the people frustrated and helpless in the face of corruption, maladministration and malfunctioning leading to alienation from the party-state. Corruption was rampant in these C.P.P. - created organizations.¹ Such behaviour on the part of functionaries in para-party agencies had a predictable effect on the local populace; it demoralized large segments of the masses and spawned alienation.

When the regime was overthrown in 1966, it was with a whimper rather than a bang, with few bewailing its passing and many expressing relief. "Popular alienation from politics", writes Kilson, "entailing the spread of cynicism and demoralization among the masses, was the outcome of the C.P.P. regime's behaviour at the grassroots".²

The demise of C.P.P. rule was followed by three years of military rule under the N.L.C. Thus for another three years Ghanaians were denied even the most basic act of political participation, the vote (it may be remembered that from 1962 to 1966 elections in Ghana were meaningless). This was followed by the election of 1969 and the return to civilian rule under the Progress Party government. But the Second Republic was short-lived. It was abruptly brought to an end in 1972 by another military coup d'etat. Ghanaians were treated to another eight years of military rule with no participation in the political process, except perhaps the ill-fated flirtation with and referendum on Union Government. In 1979, general elections preceded the return to civilian rule and the birth of the Third Republic.

1. See Special Audit Investigation into the Accounts of the United Ghana Farmers' Council Cooperatives, Accra, 1966; also Report of the Committee of Enquiry into the Local Purchasing of Cocoa, Accra, 1967.

2. Kilson, M., *supra*, p.122.

The facts are staggering. Ten of the last fifteen years of the nation's political life have been spent under unelected military governments which offered the citizenry no participation in the political process. But, and equally importantly, even during the civilian regimes (except perhaps for the early days of the C.P.P.) the people have only been 'needed' and sought after in the few weeks of an election campaign or when a show of strength was desired. The consequences of this periodic interest in the citizenry are reflected in the response of a Ghanaian villager to a rule prohibiting the taking of bribes from candidates during the 1969 election campaign. He asked:

"Why shouldn't I take money from the candidate when he comes to ask for my vote? I am poor and probably will never see him again except perhaps if another election comes along".¹

II. Unfulfilled aspiration

"Legitimacy", writes Seidman, "Demands that rulers appear to govern in the interest of the governed".² But Ghanaians have long since ceased to believe that governments (which are the popular personification of the polity) have been or are governing their interests. A sample survey carried out by Fred Hayward in 1970 showed that 72% of Ghanaian respondents agreed with the statement: "There is practically no connection between what a politician says and what he will do once elected".³ An average of 62% responded cynically to the following statements:⁴

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1. See Hayward, F.M., "Political participation and its role in development: Some observations draw from the African context", (1973) 7 Journal of Developing Areas 591.
 2. Seidman, R.B., The State, Law and Development, op.cit., p.152.
 3. Hayward, F.M., "Political expectations in rural Ghana", (1972) Rural Africana.
 4. *ibid.*

- (1) To me, most politicians do not seem to really mean what they say;
- (2) Most politicians can be trusted to do what they think is best for the country;
- (3) Most politicians are looking out for themselves above all else.

And Ghanaians are not flippant in attributing such ill-motive to their politicians. Reports of various commissions of enquiry attest to widespread corruption among the country's politicians¹. The Anin Commission reported:

" . . . the evidence which has come up from the various Commissions of Enquiry since 1953 has shown that this country's politicians, by and large, have yet to rise above these temptations"².

The military regimes have not been probed, but there is a large body of folklore of corruption about them.

Corruption by governments and politicians is gradually destroying the legitimacy of the polity.

The legitimacy of the state is also being eroded by the fact that the country has done so badly. Ghanaians have witnessed countries which are less well-endowed in both natural and acquired resources (neighbours like Togo and Benin) do much better than they are, and seen a country like the Ivory Coast (with which she is on par as far as resources, natural and acquired, go) become a paradise next-door. They have seen the promise held by independence frittered away and the enthusiasm engendered by self-rule killed by corruption and maladministration. The old vision is gone; the spirits of the people has flagged.

1. See *supra*, pp.351-356.

2. Final Report of the Commission of Enquiry into Bribery and Corruption, Accra, 1975, Chap.3, para.42.

The polity is not completely delegitimised, but the process is in an advanced state. It could be arrested and reversed, but it would be a task of herculean proportions. In a recent paper delivered to the African Studies Association in Philadelphia, Professor Merrick Posnasky, an undoubted friend of Ghana and for many years head of the Department of Archaeology at the University of Ghana, Legon, noted:

"The economic decline has resulted in a growing, though fluctuating, breakdown of national confidence in the government and an escalation of the prevailing pessimism about the future prospects for Ghana's recovery"¹.

III. Effect of the creeping delegitimation of the polity.

Lawrence Friedman has written that:

"One particularly important aspect of lay legal culture is the theory of legitimacy that prevails within a particular group"².

And Law, it has been argued, is a confidence trick³. When people lose confidence in the polity, become disenchanted with and alienated from the state and increasingly cease to identify with the state (a lot of skilled Ghanaians have voted with their feet by emigrating to neighbouring countries⁴) they rebel against its rules. In the situation that is present Ghana people are increasingly losing faith in the polity and have "little sense of loyalty to its rules"⁵.

1. printed in West Africa, No.3306, 1 December 1980, p.2418.

2. Law and Society, op.cit., p.77.

3. Supra, p.351.

4. See Addae-Mensah, I., "The causes and effects of the exodus of Ghanaian graduates science teachers", (1979) XI The Legon Observer p.31.

5. de Graft-Johnson, K.E., Administration and Corruption in Ghana, op.cit., p.21.

F. Inflation

Ghana is in the throes of a hyper-inflationary situation¹. The rate of inflation has for the past three years averaged about 100% per annum. Taking the decade 1970-80, two distinct economic periods are discernible, the period 1971-1974 and 1975-1980.

I. 1971-74

The rate of inflation during this period rose from 9.6% in 1971 to a moderate (in relative terms) 18.1% in 1974.²

II. 1975-1980

Against the background of the OPEC oil price increases of 1974, recession in the economies of Ghana's major trading partners, severe balance of payment problems, falling production, large budgetary deficits and high growth in money supply, Ghana reached three digit inflation during this period³. The official figures show that the rate of inflation is slowing⁴, but some economists think that the government is tampering with the figures⁵.

TABLE 7

CHANGES IN MONEY SUPPLY, G.D.P. AND INFLATION (%)

Year	Money Supply	G.N.P.	Inflation
1973-74	24.4	6.3	23.3
1974-75	33.0	+12.4	19.3
1975-76	37.7	-3.7	43.1
1976-77	46.9	+3.6	81.8
1977-78	69.4	+3.4	104.0
1978-79	30.4	+2.0	79.8

1. See Table 7; Steel, F.M., "Hyperinflation in Ghana", (1979) XI, The Legon Observer 308.

2. Table 7.

3. See Tables 7, 8 and 9.

4. Table 7.

(Cont.)

TABLE 8CENTRAL GOVERNMENT REVENUE AND EXPENDITURE AND TAX RATIOS 1972-73/1978-79

<u>YEAR</u>	<u>GOV'T REVENUE</u>		<u>GOV'T EXPENDITURE</u>	<u>DEFICIT</u>
	AMOUNT A ₵ MILLION	PERCENTAGE G.D.P.	AMOUNT ₵ MILLION	AMOUNT ₵ MILLION
1972-73	391.6	-	545.1	153.5
1973-74	583.6	15.1	738.5	154.9
1974-75	804.8	15.6	1161.5	356.7
1975-76	814.8	13.3	1438.6	623.8
1976-77	1084.2	11.1	1945.2	861.0
1977-78*	1365.0	7.8	3175.2	1810.0
1978-79*	2525.4	7.0*	4390.2	1864.8

SOURCE: BUDGET PROPOSALS FOR 1979/80 and 1980/81

* PROVISIONAL

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5. Aboagye, A.A., "Questionable fall in the rate of inflation", (1980) 12 The Legon Observer, 166.

T A B L E 2

GHANA'S BALANCE OF PAYMENTS - 1970 - 78 £.MILLION (US \$1.00 = £2.75)

	1970	1971	1972	1973	1974	1975	1976	1977	1978
Export f.o.b.	1,406.1	1,110.8	1,216.7	1,622.5	1,867.1	2,202	2,142	2,446.3	2,460.2
Import f.o.b.	2,235.1	1,222.0	- 706.2	41,032.1	41,947.1	-1,788.9	-1,898.2	- 2,365.5	-2,150.2
Invisibles (Net)	- 366.1	- 335.0	- 125.1	- 178.2	- 303.6	- 273.8	- 338.4	- 300.6	-1,458.2
Current Account									
Surplus+/Deficit	- 195.1	- 446.2	+ 385.4	+ 412.2	- 383.7	+ 139.9	- 94.2	- 219.8	- 148.2

SOURCE: BUDGET PROPOSALS FOR 1979-80.

III. Inflation and law

The figures make grim reading—the story is pathetic. A nation which held so much promise is fast becoming a nonentity. The people—the role occupants—do not have these figures. But they do not need them. They have witnessed hyper inflation at work. They have been hit where it hurts most—in their pockets. Their standard of living has plummeted, and the cost of living has soared to dizzy heights.

Confidence is low. Some (the educated and the skilled) have pronounced judgment with their feet and emigrated to neighbouring countries. The majority are making the best of a bad situation. And it is "all systems go". Confidence is low, so is respect for law and constituted authority. Survival is the name of the "game". The Ghanaian has become an adept "situationist" (the ability to spot situational openings and to exploit them, by whatever means, to one's advantage). In this culture, Law (and residential tenancy law) has had to take a back seat (go into abeyance).

Secondly, inflation has made an important part of residential tenancy law (rent restriction) ridiculous. When the present writer visited urban Ghana in 1978 the applicable law on the recoverable rent was N.R.C.D.158.¹ This has been in force since 1973 and fixed a rent of ₵7.50 for a sand crete room of 12ft x 12ft. In the intervening period (1973-78) prices in the economy have more than quadrupled. And yet the law was not amended. Little wonder that one was always met with the response "the government is not serious" when the attention of landlords was drawn to the paper-rules. N.R.C.D.158 has since been replaced by A.F.R.C.D.5 but the rent it fixed is only slightly less ridiculous (and is constantly being made more so by the galloping hyper-inflation). Inflation has made the law ridiculous. And when law appears ridiculous to the society which it is supposed to serve there is a great incentive to break—or rather ignore—, but little inducement to comply with the law.

1. See *supra*, pp.251-255.

IV. Conclusion

This study has not come up with a blueprint for solving Ghana's residential tenancy problems nor a model urban residential landlord and tenant code. Indeed one of the central themes of this thesis has been to emphasise that the problems of this area of socio-economic activity cannot be divorced from the socio-economic and political malaise that has afflicted the country. In this respect, the study is diagnostic rather than prescriptive. For this reason it may be seen as negative rather than positive (there is a body of opinion in Ghana which regards analysis which does not come up with solutions as negative and, by implications, useless). This charge (if made) is rejected.

In the first place it is submitted that research which is primarily diagnostic rather than prescriptive is a legitimate and important field of academic enquiry.

Second, and more importantly, though the study on the face of it appears purely diagnostic, it entails one major prescription. Simply put, it is: "Stop, Look, Listen; stop manufacturing law, it has its limits"!

This leads to the third and even more important line of defence. This study has emphasised the interrelatedness of economic, demographic, administrative, social and political factors in the field of rented accommodation. It has been argued that the effectiveness of law is conditioned by the concrete context within which it operates. It is not within the competence of the legal scientist to posit solutions to architectural, planning, demographic, economic, social and political problems. Like law, the legal scientist has his limitations.

and
Lastly, [^]most importantly, it is submitted that it is not the job of social science as an academic discipline (and Law is a social science) to lay down blueprints for the transformation of society (for that, in the final analysis, is what is required). The problems of Ghana and the rented accommodation sector are, in the final analysis, problems of political economy. Solution will depend on action in the field of political economy. One may, as political man, have views on these matters, but these are views on the political, economic and social ordering of society and not one's views qua legal scientist.